

Case No. 20221116-SC

IN THE
UTAH SUPREME COURT

DOUGLAS STEWART CARTER,
Petitioner/Appellee,

v.

STATE OF UTAH,
Respondent/Appellant.

Brief of Appellant

Appeal from final order granting petition for postconviction relief and vacating criminal homicide conviction, a capital offense, and death sentence, in the Fourth Judicial District, Utah County, the Honorable Derek P. Pullan presiding

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Oral Argument Requested

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INTRODUCTION

In 1985, Douglas Stewart Carter confessed to forcing his way into Eva Olesen's home at gunpoint, taking money from her, ordering her to lie down on the floor, tying her hands behind her back, then stabbing her several times and shooting her in the head. As Carter had described, police found Eva dead, her hands tied behind her back with a telephone cord, her pants and pantyhose pulled down, her sanitary napkin removed and lying at her feet, and her body stabbed several times and shot in the head. Carter confessed that the same night he murdered Eva, he told Epifanio and Lucia Tovar what he had done.

Epifanio's and Lucia's reports to police corroborated Carter's confession. Epifanio reported that Carter detailed the murder for him. His

details tracked Carter's own account to police. Lucia reported that Carter acted out part of the murder. At a 2021 evidentiary hearing, Epifanio and Lucia both confirmed that their 1985 trial testimony about Carter confessing to and acting out the murder was the truth.

Before reporting Carter's admissions to police, Epifanio told them to Perla Lacayo, who reported them to police. Epifanio expressed to both Perla and police his fear that Carter or Carter's family would retaliate against him, Lucia, and their son if he reported Carter. Epifanio gave these statements and details about the murder before he received any alleged payments, threats, or coaching.

Carter's confession was admitted at trial over his motion to suppress, and both Tovar's testified consistently with their statements to Perla and police. The jury also heard that the crime-scene evidence matched Carter's confession.

The jury convicted Carter of capital murder and sentenced him to death.

Carter claimed in postconviction proceedings that the State violated *Brady v. Maryland* by allegedly withholding evidence of payments, threats, and coaching, and *Napue v. Illinois* by not correcting Epifanio's allegedly false testimony at trial that he did not receive payments from police. After an

evidentiary hearing, the district court ruled that Carter did not prove that any undisclosed payments or threats to the Tovars prejudiced him because he failed to show a reasonable probability that disclosure of the payments and threats would have resulted in a different verdict. But the court said that Carter's other *Brady* claim—that the State failed to disclose that police coached Epifanio to testify that he only received a \$14 witness fee and that Carter said he was going to “rape, break and drive” the night of the murder—required a different materiality standard, where materiality is presumed and the burden shifts to the State to show that the failures to disclose were harmless beyond a reasonable doubt. The court concluded that the State failed to meet that burden, so Carter proved that his conviction and death sentence were obtained in violation of *Brady*.

But the State has no burden to prove anything in postconviction proceedings and Carter failed to meet his burden of proof. The United States Supreme Court has rejected a framework where the *Brady* materiality standard changes depending on the type of evidence suppressed. And under the Postconviction Remedies Act (PCRA), Carter had to prove a reasonable probability that, had evidence of coaching been disclosed to the defense, the result of the proceeding would have been different. The court's error also

infected its *Napue* prejudice analysis because its limited analysis there rested entirely on its error-ridden *Brady* prejudice analysis.

Many of the court's factual findings were erroneous. But even taking the court's factual findings as correct, on the entire record, Carter did not prove that any *Brady* or *Napue* violation prejudiced him at the guilt or sentencing phases. Had all the facts been put before the jury, the jury would have had no reason to doubt Carter's guilt and death-worthiness. Carter's unchallengeable confession and the Tovars' consistent and truthful corroboration of that confession—and their recent admissions that their testimony about Carter's confession and demonstration to them were true—entirely mitigate any unease a jury might have about the Tovars' testimony. The court was wrong to rule otherwise.

And the district court's other errors materially affected its decision to grant Carter postconviction relief too.

The court abused its discretion when it allowed Carter to amend his petition with a new *Napue* claim about Epifanio's "rape, break and drive" testimony ten years after filing his petition, after discovery, and after the evidentiary hearing, post-hearing briefing, and arguments concluded. The court suggested that Respondent should know that a *Brady* claim about witness coaching will always include a *Napue* violation because the goal of

improper coaching is that the witness testifies falsely or testifies in a way that creates a false or misleading impression. But the court's suggestion that an unpleaded *Napue* claim is automatically included in a postconviction petition with any *Brady* claim about coaching is wrong and has no support in law. It contradicts rule 65C's pleading standards and requirement that a postconviction petition include *all claims*. And adding this new claim after all evidence was admitted prejudiced Respondent because it could no longer ask the guilt-phase trial or resentencing prosecutors whether they knew Epifanio's "rape, break and drive" testimony was false, a necessary element for Carter to prove any *Napue* violation about that testimony.

Finally, the court erroneously conflated the inflexible mandate rule with the general law-of-the-case doctrine and its limited exceptions when it reconsidered its pre-appeal rulings sustaining objections to Wayne Watson's deposition testimony after this Court affirmed those rulings and remanded. If the mandate rule applied, as the district court correctly determined it did, then no exceptions allowed the court to reconsider its pre-appeal rulings after remand. The district court's pre-appeal rulings must stand, and it should not have considered inadmissible testimony when determining Watson's credibility.

This Court should reverse.

STATEMENT OF THE ISSUES

1. The PCRA requires that a postconviction petitioner prove by a preponderance of the evidence the facts that entitle him to relief. Under the PCRA, a court cannot grant postconviction relief unless the petitioner proves, given the entire record, a reasonable likelihood of a more favorable outcome absent the pleaded error. Did the district court erroneously grant Carter's postconviction petition and vacate his murder conviction and death sentence because Respondent did not prove that Carter's claim that police coached Epifanio to testify falsely was harmless?

Standard of Review. On appeal from a ruling on a petition for postconviction relief, this Court reviews the postconviction court's legal conclusions for correctness and its factual findings for clear error. *Oseguera v. State*, 2014 UT 31, ¶9, 332 P.3d 963.

Preservation. Respondent opposed Carter's petition for postconviction relief at an evidentiary hearing, in its post-evidentiary hearing brief, and at oral argument. R7518-8210,8312-531,8661-815.

2. Did the district court abuse its discretion when it granted Carter's post-evidentiary hearing motion to amend his petition with a new stand-alone *Napue* claim about Epifanio's "rape, break and drive" testimony?

Standard of Review. This Court reviews a district court's ruling on a motion to amend a postconviction petition for an abuse of discretion. *Neztsosie v. Meyer*, 883 P.2d 920, 922 (Utah 1994).

Preservation. Respondent opposed Carter's motion to amend his petition by written memorandum. R8637–50.

3. Did the district court violate this Court's mandate when it reconsidered its pre-appeal rulings sustaining Respondent's objections in Wayne Watson's deposition after this Court affirmed those rulings and remanded?

Standard of Review. This Court reviews a district court's holdings regarding the mandate rule for correctness. *Utah Dep't of Transp. v. Ivers*, 2009 UT 56, ¶8, 218 P.3d 583.

Preservation. Respondent partially opposed Carter's motion to reconsider admitting Watson's deposition at trial by motion, at oral argument, and in supplemental briefing. R4386–462,7265–81,7332–58,7416–23.

STATEMENT OF THE CASE

A. Summary of relevant facts.¹

1. The crime.

On the night of February 27, 1985, Orla Olesen found his wife, Eva, murdered in their Provo home. Forensic evidence showed she had been stabbed ten times: eight times in the back, once in the neck, and once in the abdomen. She also had been shot in the back of her head at point blank range while still alive. The gun was fired through a pillow. Her hands were tied behind her back, her pants and pantyhose were pulled down, and her sanitary pad had been removed and was lying at her feet. *See generally State v. Carter*, 888 P.2d 629, 633–35 (Utah 1995) (*Carter II*).

2. The initial investigation of Carter.

Carter first surfaced as a possible suspect in early to mid-March 1985 for two reasons: (1) an eyewitness identified Carter as a potential suspect for an “automobile trespass” that occurred near the murder around the same time; and (2) police learned that Carter’s wife, Anne, rushed home when she heard about the murder to find out if her husband was involved. *Id.* at 634. Police questioned Carter on March 14 and 20, 1985. *Id.*

¹ Respondent cites to the *Carter I* record (the 1985 guilt and penalty phases) as “CIR,” citations to the *Carter II* record (the 1992 penalty phase) as “CIIR,” references to the postconviction record as R____, and evidentiary hearing exhibits as Pet.Ex. or St.Ex.____.

At his first interview, Carter admitted that he knew Eva—who had purchased health care products from Anne in the past—but denied involvement in the murder. *Carter v. State*, 2019 UT 12, ¶7, 439 P.3d 616 (*Carter VI*). Carter was fingerprinted and released. *Id.*

At his second interview, police told Carter that they had brought him in for further questioning because of some discrepancies between his and Anne’s statements. *Id.* ¶8. Carter maintained his truthfulness and allowed police to take hair samples to compare with those found at the scene. *Id.* At the time of this second interview, Carter was one of about eight suspects in the murder. *Id.*

3. Anne Carter’s statement to police.

Carter became the prime suspect on April 8, 1985, when Anne gave police a statement and agreed to a search of her home, during which police recovered several articles of bloodstained clothing and .38 caliber ammunition. *Id.* ¶10. Anne reported that Carter told her that, on the night of Eva’s murder, Carter met two men at his friend Epifanio Tovar’s house. *Id.* ¶11. Carter told Anne that one of the men held a grudge against Provo Police Chief Swen Nielson, a relative of Eva, and was a recently escaped convict. *Carter II*, 888 P.2d at 635. Carter said the three left Epifanio’s home and drove to Eva’s home to steal a gold necklace. *Id.* Carter waited in the car while the

two other men knocked on the door and entered the home. *Id.* When the two returned to the car, they told Carter “she’s dead.” *Id.* Carter told Anne that the men had blood on their clothing, and he too got blood on his clothes when he pulled one of the men into the car. *Id.* Anne suspected that her missing .38 caliber handgun was the murder weapon. *Id.* at 634. And she told police that some of Carter’s clothes appeared to be bloodstained. *Id.*

4. Perla Lacayo’s police interview.

Based on information provided by Anne, Officer Richard Mack interviewed Perla Lacayo on April 10, 1985.² *Carter VI*, 2019 UT 12, ¶12. Perla was friends with Carter and Epifanio and had seen both in the days before her interview. *Id.* Perla told Mack that Carter had been acting strangely and that he had told her that he was a suspect in Eva’s murder. *Id.* Carter said he planned to leave for Chicago and gave Perla a portable whirlpool. *Id.* When she tried to use the whirlpool, it began smoking; she opened the whirlpool and found a gun wrapped in a rag or T-shirt. *Id.* Carter later returned to retrieve the whirlpool. *Id.* A few days later, Perla and Epifanio drove Carter to Wendover, Nevada. R7916. Perla left her minor children at home alone

² Perla’s last name at the time was Lacayo but is now Bermudez. Respondent will refer to her simply as Perla.

when she went with Epifanio to drive Carter out of Utah. *See* R8002-03;Pet.Ex.33. Her oldest child was nine years old at the time. *Id.*

When asked whether Epifanio knew that Carter was a suspect in the murder, Perla at first responded that she did not think Epifanio knew anything. *Carter VI*, 2019 UT 12, ¶13. Mack interviewed Perla again on April 12, 1985. Pet.Ex.15. This time, Perla reported that on the way home from Wendover (which was before police ever talked to Epifanio or Perla about the murder) Epifanio told Perla that Carter came to his house on the night of the murder with a gun and said he wanted money and that he planned to steal. R7946,7968-69. After Carter left and then returned, Carter admitted to murdering Eva and how he did it, R7945,7947,7954, including how Carter:

- Went to the lady's house and knocked on the door. When the lady opened the door he said he was looking for someone. R7954.
- Said the lady grabbed a knife, maybe in the kitchen. R7955,7963.
- Told her to let go of the knife and he "put the gun on her." R7955, 7956.
- Told the lady to lie down on the ground. R7955.
- Stabbed her in the back eight times. R7956,7965-66.
- Pulled her pants down. R7955,7972.
- Put a pillow on her and shot her after Carter saw that she wasn't dying. R7956,7966.
- Used the pillow so that "all the racket couldn't be heard from the gun." R7957.
- Didn't leave fingerprints or evidence. R7967,7968.
- Didn't take anything. R7970.
- Told Epifanio: "[Y]ou are going to hear it in the news." *Id.*

Epifanio told Perla that the real reason Carter was leaving was because he “killed the lady.” R7953. Epifanio told Perla that he feared Carter—he wanted to go to the police and turn Carter in and tell them what Carter had told him—but didn’t want Carter to do something against his son and his wife. R7949–50,7957,7960,7972. Perla told Mack: “I even started crying because I haven’t been doing well, my nerves and all, because knowing—well, if he did it, and knowing that he actually told Epifanio and Epifanio told me, then there’s two of us that know it.” R7972.

Perla told Mack that she asked Epifanio if he was telling her the truth. Epifanio answered “Yes.” “I’m telling you absolutely everything, just like he told me.” R7973–74.

5. Epifanio Tovar’s police interview.

Based on the interviews with Perla, on April 12, 1985, police concluded that they had probable cause to take Epifanio into custody on obstructing justice for taking Carter to Wendover to escape the authorities. Pet.Ex.15 at 1. Epifanio was taken into custody, and Lt. George Pierpont took a recorded statement from him. *Id.* Before Pierpont asked Epifanio any questions, he advised Epifanio of his constitutional rights, both orally and with a waiver form written in English that Epifanio said he understood before he signed it. St.Ex.F.2–4.

Epifanio admitted in his recorded statement that Carter came to his house on the night of the murder and said he “was going to go and try to steal some money.” St.Ex.F.8-9. When Carter came back, he was scared, “shaking and stuff,” “kind of nervous,” and “he had a different coat on.” St.Ex.F.12,15-16,34-35. Carter then told Epifanio “that he homicide a lady” and how he did it. St.Ex.F.11-12.

Carter told Epifanio that he went to a house, knocked on the door, and asked for “somebody,” but Epifanio did not know who. St.Ex.F.23. When a woman answered, she looked at Carter, who is Black, “like prejudice.” *Id.* Carter had not planned to kill her, but he got “real mad” when she looked at him. *Id.* Carter then pointed the gun at the woman, “told her to get in the house,” and “went after her.” *Id.* Carter said the woman grabbed a kitchen knife. *Id.* Carter pulled the hammer back on his gun and took the knife away. Carter then made the woman lie on the floor. *Id.* Carter used the knife to stab the woman about ten times. St.Ex.F.28. When the woman would not die, Carter shot her in the back of the head. St.Ex.F.41. Carter covered the gun with a pillow, but the hammer caught in the pillow, so he moved the pillow and pulled the trigger. St.Ex.F.26-28.

Carter told Epifanio that the woman he murdered “was a[n] Avon lady, because his wife sells Avon and she was an Avon lady” and Carter

“used to go out with his wife to selling Avon.” St.Ex.F.45. Carter said that he didn’t leave any fingerprints or anything. St.Ex.F.65.

In a later conversation with Carter, Epifanio asked whether Carter had raped the woman because the paper reported she had been raped. St.Ex.F.30. Carter responded that he did not rape her; he pulled her pants down, but she was “on the rag.” St.Ex.F.29–30,37,49–50. Epifanio guessed that “he wanted to rape her because [Carter], you know, would say that he’s never going to turn down no woman, you know? Like if I get it, you know, I take it.... So I think he might have—he would have raped her.” St.Ex.F.51.

Epifanio repeatedly expressed to Pierpont his fear that if Carter learned that Epifanio snitched, “then he might do something to my family” and that he was thinking of fleeing Utah. St.Ex.F.16–18,22–23,36–37,65–67,75–79. Epifanio also told Pierpont that he told Perla what Carter told him. Perla advised him “you better be careful with [Carter]. Don’t let him get too close to you or your family, because he might do something to your little kids.” St.Ex.F.65.

Epifanio said he saw the gun in a portable whirlpool that Perla owned but denied knowing what happened to the gun other than reporting that he knew Carter filed the serial number off it and said he got rid of it. St.Ex.F.53–58,68–69,71,75–76. Epifanio admitted taking Carter to Wendover. St.Ex.F.58.

After further discussion, Epifanio and Pierpont prepared a written statement, which Epifanio signed. St.Ex.F.83-100;St.Exs.G-H. There is no place in the interview transcript where Pierpont threatened Epifanio with deportation or losing his child. Based on Perla's and Epifanio's statements, the prosecutor signed an Information charging Carter with capital homicide and a warrant issued for Carter's arrest. *Carter VI*, 2019 UT 12, ¶20.

6. Police interview Lucia Tovar.

In the late evening on April 12, 1985, after Epifanio had been interviewed, Pierpont asked Mack to interview Lucia Tovar because Lucia did not speak much English and Mack spoke fluent Spanish. Pet.Ex.10 at 1. When Mack asked Lucia what she knew about Carter's involvement in the murder, she told Mack that Carter came to her house on the night of the murder at about 7:00 p.m. *Id.* He spoke with Epifanio for a few minutes and then left. *Id.* She did not understand too much because they were speaking in English. *Id.* Then, at about 10:00 p.m., Carter returned to her house and talked with Epifanio about something she could not understand. *Id.* Lucia said that Carter "was describing someone else and while doing so Doug put his hands behind his back with the back of the wrists touching together." *Id.* Lucia said that Carter did not stay long but while speaking with Epifanio he was

laughing. *Id.* Lucia understood when Carter told Epifanio that he needed “to watch TV that night.” *Id.*

7. Carter’s arrest and confession.

On June 11, 1985, Carter was arrested in Nashville, Tennessee. CIR1182. Pierpont arrived on June 12th and took a statement from Carter after advising Carter of his *Miranda* rights. CIR1182–84. Pierpont had interviewed Epifanio and heard the details of the murder from him before interviewing Carter. *See* St.Exs.F – H. Pierpont told Carter that he had spoken to Epifanio. CIR1216–17. Carter then confessed that he killed Eva. CIR1185–88; CIR.Ex.26 (Carter’s signed confession). Carter told Pierpont that he went to Eva’s home and knocked on the door. *Id.* After Eva opened the door, the telephone rang, and Eva went to answer it. *Id.* Carter walked into the house, and when Eva returned, he pointed his gun at her and demanded money. *Id.* Eva gave Carter \$20 in several bills. *Id.*

Carter said that Eva tried to get away by going to the back door, but he stopped her. *Id.* Eva picked up a butcher knife, but he pointed the gun at Eva and told her to drop the knife, which she did. *Id.* Carter ordered Eva into the back TV room, ordered her onto the floor, and tied her hands behind her back. *Id.* Carter said that he then stabbed Eva multiple times. *Id.* Eva did not die and was moaning. *Id.*

Carter went around the house looking for items to steal but found none. *Id.* He returned to Eva and “ended up” shooting her in the back of the head. *Id.* Carter tried to muffle the gun blast by placing a pillow over the gun, but on the first attempt, the hammer hit the pillow and the gun did not fire; so he shot Eva in the back of the head on the second attempt. *Id.*

Carter told Pierpont that he went back to the Tovars’ home and told Epifanio and Lucia what he had done. *Id.*

8. Preliminary hearing testimony.

At the preliminary hearing, Epifanio testified that on the night of the murder, Carter was at his home and before he left told Epifanio that “he was going to break into a car or steal some money.” Tr.Prelim.Hr’g at 20. Epifanio testified that Carter confessed to killing Eva and that Carter even reenacted how he did it. *Id.* at 20–22.

Lucia testified, with the aid of an interpreter, that she had not understood much of the conversation between Carter and Epifanio at her home on the night of the murder, but she had watched Carter’s demonstration. *Id.* at 52–55. Lucia said that Carter “was nervous and then he was telling her husband that he was very nervous and then her husband answer[ed] you’re crazy.” *Id.* at 53. Lucia said that Carter was demonstrating on the floor his hands behind his back and “he start[ed] moving his hand

back and forth. He opened his legs and then just bent over more.” *Id.* at 53–55. Carter also demonstrated shooting someone. *Id.* at 55.

Perla testified that about a month after the murder, Carter gave her a portable whirlpool. *Id.* at 41–42. About eight days later, she looked inside and saw a gun. *Id.* at 43. She also testified that she took Carter to Wendover, Nevada, with Epifanio. *Id.* at 35–36.

Carter presented no evidence or witnesses at the preliminary hearing.

9. 1985 trial.

The trial court admitted Carter’s confession and allowed Pierpont to testify about the detailed account Carter told him about murdering Eva. CIR1180–1219; CIR.Ex.26. Pierpont testified that he asked Carter if he ever considered raping the victim and Carter told him that he “thought about it.” CIR1216. Carter also admitted that he went to the Tovars’ home and told them “basically” the same account of the murder that he gave to police. CIR1188.

Carter presented no evidence at the 1985 trial that his confession to Pierpont, including the admission that he told the Tovars about the murder, was false.

Epifanio testified that, on the night of Eva’s murder, Carter came to the Tovars’ home and told Epifanio that he had killed a woman. CIR1128–33.

Prosecutor Wayne Watson asked Epifanio, "What, if anything, did he tell you he was going to do when he left the first time?" CIR1129. Epifanio testified that Carter said, "he was going to rape, break and drive." *Id.* Watson followed up by asking whether Carter told him that. *Id.* Epifanio said, yes. *Id.* Watson asked again for clarification, "what's your best recollection, Mr. Tovar, of what the defendant told you he was going to do? Tell me what you remember him saying?" CIR1129-30. Epifanio corrected himself and responded, that "he was going to [g]o break in a house" because he "[n]eeded money." CIR1130.

Epifanio testified that Carter said he went to the woman's home, knocked on the door, and, when she answered, asked for someone who did not live there. CIR1137. Carter said that he got angry and entered the home after Eva looked at him differently because of his race. *Id.* Epifanio testified that Carter said he chased Eva into her kitchen, where she grabbed a knife. CIR1138. Carter told Epifanio that he threatened Eva with his gun and told her to put the knife down. *Id.* Eva then threw the knife to the floor. *Id.*

Epifanio testified that Carter showed how he tied Eva's hands behind her back, getting on the floor to show how he did it. CIR1137. Carter told Epifanio that he stabbed Eva about eleven times. CIR1136-41. He put a pillow over the gun to muffle the sound. *Id.* After the gun misfired because the

hammer caught in the pillow, Carter repositioned the gun and the pillow and fired into the back of Eva's head. *Id.* Epifanio testified that, when he expressed his doubts to Carter, Carter told him to watch the news. *Id.* Epifanio later asked Carter if he raped Eva. *Id.* Carter told him that he did not because Eva was "on the rag." *Id.*

When asked why Epifanio did not go to the police after Carter told him that he murdered Eva, he said because he "was afraid of what might happen to me and my family." CIR1141.

Epifanio also testified that on about April 8, 1985, Carter brought a whirlpool machine with a .38 caliber handgun inside it to Epifanio's home while Epifanio was asleep. CIR1145-47. The next day, Carter told Epifanio to throw the gun away. *Id.* Epifanio threw the gun in a river around April 11th. CIR1147-48. Epifanio testified that he drove Carter to Wendover because Carter asked him to. CIR1144,1148.

On cross-examination, Carter's counsel asked Epifanio, "[D]id you and or your family anytime between February and now receive money or support from Mr. Watson's office or from Mr. Pierpont, the police?" CIR1164. Epifanio responded that he and his wife, Lucia, had each received only a check for \$14. *Id.*

Epifanio admitted during cross-examination that he at first lied to police about disposing of the gun Carter gave him, spent four days in jail mere days after he took Carter to Wendover in April, and was charged with obstruction of justice. CIR1163-78. Epifanio admitted that, when he told police about disposing of the gun, the police promised him that he would not have any problems if he testified about the gun. *Id.* Epifanio admitted that he was in the country illegally. CIR1163. Trial counsel E. Duke McNeil asked whether the police told Epifanio to come to trial “and say what you were supposed to say today?” Epifanio responded, “They told me to come here and say the truth.” CIR1179.

On redirect, Epifanio reiterated that police and prosecutors “just told [him] to come and say nothing but the truth.” *Id.* And he specifically denied that “anyone ever told [him] to lie about this incident...in order for [him] to get something out of it.” *Id.* And Epifanio said that he didn’t tell anyone about the gun until recently because he “was afraid.” CIR1180.

Lucia testified through an interpreter that on the night of the murder Carter came to her home and demonstrated how he tied up and stabbed Eva. CIR1255-58. She testified that Carter “laid himself to the floor showing us exactly how he had forced this individual to lay down, and then he put his hands behind his back to illustrate how he had tied her hands behind her

back.” CIR1258. He also demonstrated how he was “holding up his hand with the fist clenched and moving it forward and backward.” *Id.* “He laughed and laughed about something he had done.” *Id.* She did “not know if it was because he was nervous or why. But he continued to laugh” *Id.*

Lucia also testified that she overheard the conversation between Carter and her husband. CIR1256–57. She testified that the conversation was in English and that she understood part of it. CIR1261. She understood that when Epifanio expressed his disbelief about Carter’s story, Carter responded that he swore “‘by [his] mother’” that it was true and to watch the news. CIR1259. She asked Epifanio, “‘Why is he telling me to watch the television?’” *Id.*

On cross-examination, Lucia said that she had “never been threatened” or “pushed into saying anything.” CIR1269. When asked whether Epifanio ever kept a gun in the house, Lucia said no, but that “on one Friday evening Douglas Carter came to my house and gave me a box. I didn’t know what was in it. And he asked me to keep it, and he put it to the side [of] my bed.” CIR1269–70. Lucia continued to answer in Spanish, but McNeil and the court cut her off and did not permit her to continue. CIR1270.

Orla Olesen, Eva’s husband, testified that, on the evening Eva died, he arrived home from feeding his horses, loaded his van for the next day’s work,

and went across the street to visit a neighbor. CIR1075-83. He testified that he later returned home and found Eva's body. *Id.* He described that Eva was nude from the waist down, her hands were bound behind her back with a telephone cord, and a knife lay on the floor next to her. *Id.* He also testified that he saw stab wounds. *Id.*

The medical examiner testified that Eva suffered ten stab wounds. CIR1278. She testified that the knife found by Eva's body could have caused the wounds. CIR1277-78. She also testified that Eva suffered a gunshot wound to the head fired from no more than half an inch from Eva's skull, and that Eva was alive when she was shot. CIR1278-82.

A sample taken from the pillow had an unburned gun powder particle on it. CIR1328.

Mack testified that in his search of Carter's apartment, he found .38 caliber bullets in the back bedroom in a box on the bed. CIR1305. The evidence established that the bullet recovered from Eva's skull could have been fired from a .38 or .357 caliber handgun; that the handgun could have been a .38 caliber Charter Arms handgun; that Carter's wife, Anne, owned a .38 caliber Charter Arms handgun; that the bullet recovered from Eva's head bore physical characteristics narrowing the brand to either a CCI or

Superbell; and that police seized CCI bullets from Carter's apartment. CIR1309-26.

Carter called no witnesses and did not testify. No evidence contradicted Pierpont's testimony about Carter's confession. No evidence contradicted Epifanio's testimony about Carter's confession to him, about Carter acting out the murder, or about Carter's direction to him to dispose of a gun.

In closing, Carter's counsel attacked Epifanio's credibility and suggested that Epifanio was "not to be believed," that "he is manipulative," and that "he is a liar," because "he is trying to bail out and save himself" from the obstruction charge. CIR1361-63,1373,1375-76.

The 1985 jury convicted Carter and sentenced him to death.

10. Carter's direct appeals.

Carter appealed. This Court affirmed the conviction but reversed the sentence. *Carter I*, 776 P.2d 886 (Utah 1989). Among other things, the Court in *Carter I* held that Carter's confession was voluntary, and Carter received effective assistance of counsel. *Id.* at 890-94.

But the *Carter I* Court reversed Carter's death sentence and remanded for a new penalty proceeding, finding the trial court failed to sufficiently

instruct the jury on the aggravating factor element in first degree murder. *Id.* at 896.

11. 1992 resentencing hearing.

The trial court held a new sentencing hearing in 1992. *Carter II*, 888 P.2d 629. Wayne Watson did not represent the State at Carter's resentencing hearing; Deputy Utah County Attorney James R. Taylor did – Watson was no longer with the Utah County Attorney's Office at that time. *See* CIIR2109.

At the 1992 penalty hearing, the State introduced an Abstract from Transcript of Trial, which contained the statements of all witnesses who testified at the 1985 guilt and sentencing proceedings. *Carter II*, 888 P.2d at 636–37. Carter twice objected unsuccessfully to the State's plan to read selected excerpts from the document and to its entry into evidence as an exhibit. *Id.* The State read from the transcript, including the Tovar's testimony because they were unavailable to testify, and entered it into evidence. *Id.* at 646–53. A jury again sentenced Carter to death. This Court affirmed. *Carter II*, 888 P.2d 629.

12. Carter's first postconviction petition.

Carter's first petition for postconviction relief was denied, and this Court affirmed. *Carter v. Galetka*, 2001 UT 96, 44 P.3d 626 (*Carter III*).

Carter petitioned for habeas relief in federal court. *Carter v. Bigelow*, No. 2:02-cv-00326-TS (D. Utah). About four years into that litigation, Carter filed a successive state postconviction petition. *Carter v. State*, No. 060400204. It was denied, and the denial was affirmed. *Carter v. State*, 2012 UT 69, 289 P.3d 542 (*Carter IV*).

13. The Tovars resurface.

At some point after Carter's trial, the Tovars left the United States. In 2011, while Carter's appeal of his second postconviction petition was pending, Carter's appellate counsel located the Tovars in Mexico and interviewed them. *Carter v. State*, 2015 UT 38, ¶5, 345 P.3d 737 (*Carter V*). Carter's federal habeas proceedings were stayed so he could return to state court to exhaust his claims related to the Tovars. *See Carter v. Crowther*, No. 2:02-CV-326 TS, 2016 WL 843273, at *3 (D. Utah Mar. 1, 2016).

B. Summary of proceedings and disposition of the court.

1. Carter's postconviction petition.

Carter's postconviction petition here raised three claims: (1) the State violated *Brady* by failing to disclose that police paid the Tovars' rent and other living expenses, threatened the Tovars with arrest, deportation, and losing their child, and that the police or prosecutor coached them not to disclose the payments, (2) the prosecution violated *Napue* by

failing to correct Epifanio's false trial testimony that he only received from the State a \$14 witness fee; and (3) the prosecution improperly vouched for the Tovars at trial. R1-85,89-356.

Respondent moved for summary judgment. R379-447. The district court granted Carter's rule 56(d) discovery motion. R1054-56. Then Carter deposed prosecutor Wayne Watson. Respondent raised various objections, R2009-310,2332-38, and the district court ruled on those objections. R2405-10.

The district court granted summary judgment on all of Carter's claims. R2414-44. This Court affirmed the district court's dismissal of Carter's vouching claim and reversed on the *Brady* and *Napue* claims, remanding for an evidentiary hearing. *Carter VI*, 2019 UT 12, ¶166. On Respondent's objections to Watson's deposition testimony, this Court explained: "Carter has not provided briefing arguing that we should reverse the district court's ruling on this evidence. Because Carter has not briefed the issue, we do not reach it and we affirm the district court's holding with respect to this evidence." *Id.* ¶¶164-65.

2. Pre-hearing motions.

Carter moved to introduce Watson's entire deposition transcript at the evidentiary hearing because Watson died. R4291-372. Respondent agreed

that Watson's deposition transcript could be introduced at the hearing but argued that the district court had ruled pre-appeal that parts were inadmissible, and the mandate rule strictly prohibited the district court from reconsidering on remand anything it had ruled inadmissible and that this Court had affirmed. R4386-462. In reply, Carter "acknowledge[d] that these evidentiary rulings still stand," and only argued that this Court "did not reach the issue of whether [the district court]'s rulings on Respondent's objections to Watson's deposition were proper." R5201-02. Carter did not argue that any exception to the general law-of-the-case doctrine applied.

At oral argument the district court raised for the first time whether "an exception to the mandate rule" – when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice – applied to some of the court's previous rulings on Respondent's objections to Watson's deposition testimony, which would give the court discretion to reconsider those rulings. R7256-65.

After supplemental briefing, R7332-58,7396-401, the court said that "the mandate rule applie[d] because the district court did make pre-appeal rulings on each of the State's objections to the Watson deposition...unless an exception to the mandate rule applies." R7492. The court reviewed the prior rulings on the Watson deposition objections, sustained some, and overruled

others because, the court concluded, they were “clearly erroneous and would work a manifest injustice.” R7493–502.

3. The evidentiary hearing.

The district court presided over a four-day evidentiary hearing.

i. Epifanio Tovar’s testimony.

Epifanio testified by video deposition from Tijuana, Mexico. Epifanio testified that he arrived in Provo, Utah from Mexico illegally in 1977. Pet.Ex.1 at 15.

Epifanio testified that Carter told him that he murdered Eva. *Id.* at 36. He also admitted to helping Carter escape by driving him to Wendover after Carter told him that he killed a woman. *Id.* at 55–56. And Epifanio admitted to helping Carter by disposing of the gun. *Id.* He also admitted that when he and Perla were in the car driving home after dropping Carter off in Wendover they talked about how “Carter said he had killed a woman.” *Id.* at 42. But Epifanio claimed that Perla “already knew that Carter had killed a woman.” *Id.*

Epifanio confirmed that when he and Perla drove Carter to Wendover, the police had not begun paying his rent or moved him into a new apartment. *Id.* at 40,74. Epifanio told Perla that he wanted to tell the police that Carter

told him that he killed a woman, but that he was afraid the police would send him to prison. *Id.* at 70.

Epifanio confirmed that he truthfully told Pierpont what Carter told him about murdering Eva. Epifanio told Pierpont that when Carter came back to his house the night of the murder the second time, he was nervous. *Id.* at 80.

Epifanio confirmed that Carter told him that he knocked at a house and the lady who answered the door looked at him like she was prejudiced. *Id.* at 81. Carter told Epifanio that he stole nothing; he went into the house and the lady grabbed a knife; he took the knife away and made her lie on the floor; he stabbed her in the back about ten times, but he wasn't sure how many times; the lady wouldn't die, so he shot her in the head; he grabbed a pillow and pulled the trigger, but the pillow held back the hammer, so he moved the pillow and pulled the trigger again; and that he didn't leave any fingerprints. *Id.* at 81-83.

Epifanio confirmed that when Carter came back to his house on the night of the murder the second night, "he was wearing different clothes and he had just showered." *Id.* at 83. Epifanio said that Pierpont tried to get him to say things during their interview that did not happen but agreed that he

corrected Pierpont when Pierpont asked whether things happened that didn't. *Id.* at 83–84.

Epifanio confirmed that he told Pierpont that he saw the gun at Perla's house in the whirlpool. *Id.* at 84. Then Epifanio clarified that he saw the gun at Perla's house, and he saw it again when he took it out of the device and threw it in the river. *Id.* at 85. Epifanio remembered that he eventually told the police what he did with the gun, but he did not know whether the police already knew that before he told them. *Id.* at 85–86.

Epifanio confirmed that it was true when he testified at the preliminary hearing that Carter lay on the living room floor and demonstrated what he had done to Eva. *Id.* at 87. Epifanio said that from the moment Carter arrived the second time on the night of the murder, "he was laughing because he was nervous." *Id.* at 87–88. Epifanio denied that Carter had a habit of nervous laughter. *Id.* at 96. And Epifanio admitted that Lucia was in the same room when Carter was telling Epifanio about murdering Eva, and Lucia could hear Carter laugh. *Id.* at 50.

Epifanio confirmed that on the night Eva was murdered, Carter came to his house and said that "he was going to break into a car and steal." *Id.* at 20–21. At first, Epifanio could not even remember saying at trial that Carter said he was going to "rape, break and drive." *Id.* at 23–24. After a break, and

after reviewing his trial testimony, Epifanio remembered telling the jury that Carter said he was going to “rape, break and drive.” *Id.* at 25. But Epifanio said Carter did not say that to him. *Id.* What Carter said to him was that “he was going to break into a car and steal from the car.” *Id.* at 26. Epifanio said he said, “rape, break and drive” at trial because that is what the police wanted him to say. *Id.* at 26–27. He thought Pierpont told him to say that when Epifanio met with Pierpont before Epifanio testified. *Id.* at 27–28. Epifanio said he also met with the prosecutor before testifying, so it “would have been either of the two, Pierpont or the prosecutor. I don’t recall.” *Id.* at 28. But Epifanio also testified that when the prosecutor met with him and his wife before trial, Watson did not tell him that he wanted Epifanio to say anything that was not the truth. *Id.* at 60–61.

Epifanio remembered telling Carter’s defense counsel at trial that he did not receive “anything of financial value from the police” other than a \$14 witness fee. *Id.* at 29–30. Epifanio said that was not true because “they would pay my rent. They would buy me food. They would pay for my expenses, my services, like my phone, electricity and water; gas.” *Id.* Epifanio said that Mack gave him groceries, gave him money to pay rent, and paid his phone and other utility bills directly. *Id.* at 32–33.

Mack also gave the Tovars Christmas presents and a Christmas tree. *Id.* at 30. Epifanio did not feel that the Christmas tree and gifts were to protect him, it was “just simply the Christmas spirit.” *Id.* at 95–96. Epifanio said that it was possible he received a Christmas tree and gifts after he had testified. *Id.* at 101. Epifanio said that he thanked Mack for the Christmas tree and gift, but also said that after the trial he never spoke with Mack again. *Id.* at 31,101–02.

Epifanio said that he lied when he testified that he received nothing from the police because Mack “asked me not to say anything” a “little bit before the trial.” *Id.* at 30–31. Epifanio explained that he lied because he was afraid, “because if they didn’t...catch the guy, they would arrest me as the murderer.” *Id.* at 58. The police told him that they could charge him for obstruction or for being an accomplice. *Id.* at 91.

Epifanio said that he lied to the jury about the items he received like the police told him to do and about Carter telling him that he was going to “rape, break and drive” because he “was scared” and “thought they would put me in jail and take my son away and deport my wife.” *Id.* at 34. Epifanio said that the police told him that “they would accuse me of being an accomplice, and that they would put me in jail and that they would deport my wife and that they would take my son away.” *Id.* at 35. Epifanio later

clarified that Pierpont threatened him with jail, deporting his wife, and taking his son away when he “had just been arrested.” *Id.* at 59. But Epifanio denied that anyone told him that he would be deported or lose his son if he did not lie about the police paying his rent or other expenses. *Id.* at 58–59,90.

Epifanio knew that he could have been deported at any time for being in the United States illegally and thought that the police would deport him when they arrested him. *Id.* at 58. “But they didn’t deport [him] because they wanted [him] to help them.” *Id.*

Epifanio never told the police that he did not need witness protection. *Id.* at 62. And he never told police that he was not afraid of Carter. *Id.* What’s more, Epifanio confirmed that he told Pierpont that he was afraid of Carter. *Id.* at 49,95.

Epifanio confirmed that he told Pierpont that he did not want to say what Carter told him because he “didn’t want to get involved” or “wrapped up.” *Id.* at 78. Epifanio denied that he told Pierpont that he did not want Carter to know that he had told the police what Carter did, but his reasoning was because he “was the only one who knew. I was his only friend.” *Id.* at 79. Epifanio confirmed that he told Pierpont that if Carter knew that he had told the police Carter might do something to Epifanio’s family. *Id.* at 79.

Epifanio agreed that Pierpont promised him that nothing would happen to his family, but then said that Pierpont also threatened to put Epifanio in jail, deport his wife, and take his son away. *Id.* at 79–80. And Epifanio recalled that the police were pressuring and threatening him “so that [he]...wouldn’t leave.” *Id.* at 80.

ii. Lucia Tovar’s testimony.

Lucia confirmed – through an interpreter and remotely from Culiacan, Mexico – that she told Mack the truth about what she saw Carter doing the second time Carter came to her house on the night of the murder when he was talking to Epifanio and laughing and that her trial testimony was true. R7628–30. Lucia testified again at the evidentiary hearing that when Carter came to her house on the night of the murder, “he was demonstrating something on the floor and, yes, he was laughing.” R7625,7629. Lucia could not remember what he was laughing about, but it seemed to her “as though he was nervous.” R7626. After Carter left the house, Lucia said Epifanio seemed “[l]ike he couldn’t believe it.” R7635–36. The next day, Epifanio watched the news and told Lucia that Carter “had gotten in trouble” but did not tell her why. R7643–44.

Lucia testified that Mack moved her and her family to a different apartment twice after she was identified as a witness. R7618–19. After

Epifanio was arrested and released, Mack told them that they “needed to look for an apartment to move.” R7650. Mack told her that they should move “in case anything were to happen.” R7673.

Lucia testified that Mack gave money to Epifanio for their rent and utilities when they moved apartments. R7619. Close to Christmas, Mack also gave the Tovars a Christmas tree, \$100.00, and toys for the children. R7619,7627. Lucia said that she knew it was Mack that gave her those things because he called her and asked whether she liked the things they had brought her. R7671-72.

Lucia was adamant that Mack came to her house the day after Carter came to her house the night of the murder. R7644-45,7649.³ Lucia testified that the first time Mack threatened them with jail and deportation was “when they arrested” Epifanio. R7649,7652,7655. Lucia claimed that Mack threatened to arrest Epifanio, take their child away, and deport them. R7620-21,7647. She said that before trial in an office in the courthouse, Mack told her not to say anything about the assistance he was giving them. R7624-25,7657-

³ Mack testified that he never spoke with Lucia the day after the murder. R7754. Mack did not even know Lucia at that time. *Id.* The first contact police had with Epifanio about the murder was months after the murder. *See* Pet.Ex.15;St.Ex.F-H.

58,7675.⁴ Lucia said that when she testified at trial that she had never been threatened or pushed to say anything, that was not accurate because Mack did threaten her. R7626.

iii. Perla Lacayo's testimony.

Perla testified that she was friends with Carter and Epifanio in 1985. R7899,7906–07. At first, Perla denied being in contact with Carter since the 1985 trial, but then admitted that she and Carter have corresponded while he has been in prison. R7904–05. Perla donated money to Carter's prison commissary. R7905. Perla also speaks with Carter on the phone and did so as recently as a couple of weeks before the evidentiary hearing. R7905–06.

Perla admitted that she drove with Epifanio and Carter to Wendover after the murder. R7915–16. But Perla claimed not to remember any of her statements to Mack about what Epifanio reported on their drive back from Wendover about what Carter told Epifanio about murdering Eva. R7916–18.

Respondent confronted Perla with her prior statements to Mack from their recorded interview about Epifanio's statements to her on their drive back from Wendover, about what Carter told Epifanio about murdering Eva. *Id.* Because Perla claimed not to remember anything, some of her prior

⁴ Mack did not remember meeting with the Tovars and Watson in the courthouse before trial. R7754.

statements to Mack were entered into the record for the truth under Utah Evidence Rules 801(d)(1)(A)&(B) and 613 as Perla's prior inconsistent statements and Epifanio's prior consistent statements. R7922-27,7941-43.

When it permitted Perla's statements to Mack to be admitted into evidence, the Court found that Perla's "lack of memory...is implausible and it has to be viewed in light of her continuing at first her denial of having remained in touch with...—Mr. Carter and then her...multiple concessions that she has written to him, that he has written to her, that she has given him money on his commissary account, that she has talked on the telephone with him as recently as just a couple of weeks ago, and her claim that she nevertheless did not talk about this case." R7926.

At the evidentiary hearing, Perla claimed that in 1985, Mack threatened her with deportation and losing her children. R7994-95. She said that the police called child services the day she was taken to the police station when she returned from Wendover after helping Carter flee the state. R7995. But Perla admitted that she had left her young children home alone overnight when she helped Carter flee to Wendover. R8002-04. Perla claimed not to remember how old her oldest child was in 1985 but admitted that her oldest child was born in 1975. R8003. Carter's counsel stipulated that there are no

threats of deportation or loss of Perla's children in the recorded transcripts of her interviews with Mack. R8001.

iv. Officer Richard Mack's testimony.

Mack testified that he never threatened to arrest Epifanio or threatened Epifanio or Lucia with any negative consequences. R7793. Mack never threatened or coached the Tovars to say anything in their testimony or to lie. R7755-56,7794,7801,7794. He never told the Tovars not to divulge the rent and utilities payments if they were asked about it at trial. R7794. Mack never tied any benefits or cash he provided to the Tovars to any expectations about what he wanted the Tovars to say at trial. R7757. He never discussed paying the Tovars for their testimony. R7793. Mack explained that there would be no need to do that because the evidence was clear and there was a confession from Carter that corroborated everything. R7757-78. Even discussing such a thing "upset[]" Mack because "[i]t would not happen" and "[i]t did not happen." *Id.*

Mack testified that he never threatened to deport Epifanio or Lucia. R7751-52. And he never leveraged any fear of deportation to "strong-arm" the Tovars into cooperating with the police. R7752. Mack never threatened Lucia that she would lose her son if she did not do anything specific for the police or the prosecution. R7753-54.

Mack explained that he did not record his April 15, 1985, interview with Lucia because there was not enough time to wait for an interpreter, so he just translated what Lucia told him in his police report. R7695;Pet.Ex.10. The interview took place at 9:30 p.m., after Lucia was already at the police station with Pierpont, so it was not Mack's responsibility to have a recording prepared because he was merely a "pinch-hitter" for Pierpont, who could not speak Spanish. R7727-28. This interview took place before Mack gave the Tovars any payments. R7749-50.

Mack made clear that it was obvious that the whole interview was about Lucia, as an observer, showing Mack what Carter showed Epifanio. R7701. Her interview "was so unique" because Carter "was so demonstrative about what he had done, that that's what she understood because she saw all the actions by the suspect." R7700. Lucia's demonstrations of Carter's actions "really impressed" Mack because she did not speak English, but "she showed what [Carter] was doing to the victim," and Mack "thought it was amazing how much of that she understood, and that she was given very accurate information as to the crime scene and what happened to the victim." R7747-48. Mack did not give Lucia any information about Carter laughing, which Lucia said Carter was doing on his second visit to the Tovar's home the night of the murder. R7750-51. Mack remembered Lucia giving him a lot more

information than is documented in his report of their conversation but said that perhaps over the years he has confused what Perla said to him with what Lucia said. R7809.

Mack's role in the murder investigation was minor at first but ended up becoming larger. R7730. At first, Mack participated in serving the search warrant of Carter's apartment, where he found the same type of ammunition that had been pulled out of Eva's head during the autopsy. *Id.* Pierpont then assigned Mack to keep in touch with the Tovars weekly to see if they heard anything about the case because the police had little to go on at the time. R7731-32. Mack explained that he would not have told Pierpont about every interaction he would have had with the Tovars because much of it was "very trivial." R7732. Mack was the primary contact to the Tovars from the Provo police after Epifanio was released from custody. R7684-85. He would check in on them multiple times a week to make sure that they were "taken care of" and that they did not "leave town for employment" or "go back to Mexico." R7733,7742-43. Mack "was always very friendly" with the Tovars and started having a "very good relationship with them." R7744. Mack believed that they were his friends, and that he was their friend. *Id.* Mack "never" intended to intimidate either of the Tovars. R7745.

It was Mack's responsibility to make certain that the Tovars were happy. R7687. He gave them money in cash for rent, bills, and groceries for a time before they testified at trial because Pierpont told him to. R7687,7739-40,7805. Mack guessed that the payments could have totaled a couple of thousand dollars. R7688-89. If the Tovars said that they needed something Mack would provide cash from the police department. R7743. Mack did not remember filling out forms documenting these payments. R7743-44.

Mack believed that the Tovars were a flight risk because they were from Mexico. R7733-34. Mack explained that the money he provided for rent and other expenses was "[t]o make sure that they stayed" in Provo, Utah because they were important witnesses. R7740-41. Mack would not be surprised if the prosecutor, Wayne Watson, knew about the payments to the Tovars, but Mack did not tell him. R7693. Mack was sure that other people in the police department knew also, including Pierpont. *Id.*

Mack did not believe that the Tovars were in danger, but the Tovars told Mack that they were. R7734. Lucia told Mack "several times" that "[s]he was worried that they had come forward and that [Carter] would get out, maybe bail out or get out on a technicality, and that he would come after them." *Id.* Lucia never told Mack she was no longer afraid of Carter. R7734-35. As the trial drew closer, Lucia's fears became more intense because "[t]hey

were going to be in the same room together” in the courtroom. R7735. Epifanio expressed his general fears to Mack more than once, but not as much as Lucia. R7735-36,7746-47. Epifanio told Mack that “if [Carter] got out, [Carter] would come after him.” R7747.

Mack also provided the Tovars with Christmas gifts out of his own pocket, but the Tovars did not know they were from him because they did not see him give them and he did not tell them—it was important to Mack’s religious beliefs that the gifts be anonymous. R7689,7692,7737. Mack and his wife give out Christmas gifts to needy families every year and have done it for many people. R7737. Mack believes that he would have given the Christmas gifts closer to Christmas Eve, La Nochebuena, “the big day” for Latin American people. R7691-92,7725-26. So it was likely that he gave the Tovars Christmas gifts after they testified at trial. R7690-91. And Mack remembered speaking with the Tovars at least once or twice after Christmas too. R7685.

Mack did not recall knowing the Tovar’s immigration status when he first interviewed them. R7729. And their immigration status was not something Mack would have cared about because it had nothing to do with the case. R7729-30. Mack remembered Lucia telling him more than once that she was afraid of being deported. R7704. Mack told the Tovars that “as long

as they are involved in a murder case that no agency would be sending her back to Mexico.” *Id.* Mack did not know why the Tovars were not deported after their trial testimony. R7705. He did not even know if federal authorities were aware of the Tovars and their immigration status. *Id.*

Mack testified that Lucia was the only one that would bring up deportation, unprompted. R7752-53. She claimed that someone else—possibly Pierpont—threatened to deport them. *Id.* Mack never talked to Pierpont about Lucia’s claims. R7753. Mack never had the power to deport people. *Id.*

Mack explained that “it would be much more advantageous and helpful” to “be friendly with [the Tovars] instead of an enemy.” R7808. Mack did not see “how being an enemy with them or making threats to them was going to help” the police’s situation. *Id.* The purpose of being friendly was “so that [the Tovars] trusted” Mack and that he “could get [his] job done. R7808-09.

Mack confirmed that he interviewed Perla on April 10 and 12, 1985, but he remembered it as one conversation. R7789. Those interviews were recorded. Mack also conducted an interview with Perla that was not recorded. R7787-88. Mack remembered that interview happening on April 10th, just before the recorded interview. R7788-90; *but see* Pet.Ex.29 (police

report reflecting that on April 10, 1985, Pierpont instructed Mack to interview Perla in Spanish because he was having a difficult time communicating with her).⁵

Mack saw Perla driving away as he approached her door, followed her to a 7-Eleven, said hello, and said he needed to talk to her. R7788. Perla said she needed to talk to Mack too because she had “something really important” to talk to Mack about. *Id.* So Mack took Perla to the police station. R7788–89. That conversation lasted 10 or 15 minutes. R7790. She told Mack that “she knew who committed the murder and that she discussed it with Epifanio, and that she had told Epifanio that the next time [Mack] came to check with them that she was going to tell [Mack] the truth.” *Id.* As soon as Mack had enough information, Mack stopped the interview, “ran down the hall,” “barged in the chief’s office, and [he] said, we’ve got this case solved.” R7792. Then the police chief and Watson required Mack to reinterview Perla and

⁵ The unrecorded interview likely occurred on April 12th, because that was the day that Perla divulged everything she knew about Carter murdering Eva that Epifanio told her Carter told him about. That would track Mack’s memory about Perla wanting to tell him the truth about what Epifanio told her. Pet.Ex.15 (Pierpont requested that Mack reinterview Perla to see if she had any more information about Carter’s whereabouts). And it would also track Perla’s statements in the first part of her recorded interview, which likely occurred on April 10th, where she claimed not to know anything about the murder or that Epifanio knew anything either. R7987–88.

record it. R7696. Mack did not know that Perla was in the country illegally at the time. R7801.

Mack testified that members of the Provo police were emotionally involved in the Carter case because the victim was related to the police chief, Swen Nielsen. R7679-80. Mack would not go so far as to say that the police chief was too involved in the case. R7680. But Mack thought that it was concerning for Nielsen to speak at Eva's funeral and make positive statements about Eva's husband, the main suspect for the murder at the time. R7721-23. Nielsen was involved at the beginning of the investigation, but he was not involved after that. R7683-84,7723. He did not give briefings on the case and Pierpont gave out most of the assignments. R7680.

v. Lieutenant George Pierpont's testimony.

Pierpont testified that he never threatened the Tovars or Perla, told them to lie about anything, told them to testify about anything specific, made any promises except to protect Epifanio and his family, nor told them to deny receiving payments from the police if they were asked at trial. R8048,8083,8093.

Pierpont was aware of Epifanio's illegal immigrant status during their interview. R8059. Before, during, and after the interview, Pierpont never threatened Epifanio with any immigration-related consequences. *Id.* And

Pierpont never threatened Epifanio with the loss of his son or his wife if Epifanio did not cooperate. *Id.*

Pierpont testified that he served with the Provo Police Department for 31 years and retired as a captain. R8031. In 1985, Pierpont was the lieutenant of the Special Investigative Services Bureau. R8031-32. He was assigned to lead the major case squad investigating Eva's murder, but his captain was Warren Grossgebauer, who supervised the entire case. R8033. Pierpont was lead investigator, with responsibilities for directing the investigation, handing out assignments, and coordinating with Grossgebauer. *Id.*

Pierpont took Carter's confession and interviewed Epifanio. *Id.* Epifanio came to Pierpont's attention when Wayne Watson called Pierpont several weeks after the murder and asked to meet him at a 7-Eleven in Springville. R8034. Watson had information that came from his private practice law partner who spoke with Anne Carter. R8035-36. Anne suspected that her husband, Carter, may have been involved in Eva's murder. *Id.* And Watson had information on the Tovars, who were Carter's friends. R8036-37. After that conversation, Pierpont suspected that Carter participated in Eva's murder, so the investigation turned towards him, and Epifanio became a relevant person of interest. R8037. The police interviewed Anne, who knew

the Tovars, and Pierpont's investigation team located the Tovars within a few hours. R8037-39.

Pierpont's first real contact with Epifanio was when Epifanio was brought into the police station to be interviewed. R8039;St.Exs.F-H. Pierpont may have seen him somewhere briefly before that, but he did not recall, and if he did, he did not speak with Epifanio about the murder until the interview at the police station. R8045-47. When asked about this earlier meeting, Epifanio agreed that it was not about the murder and that Pierpont did not threaten him then. Pet.Ex.1 at 76.

Epifanio's interview was recorded in a room in the Criminal Investigation Division. R8044. Pierpont only remembered himself and Epifanio being in the room. *Id.* Epifanio was not restrained, and Pierpont read him his rights. *Id.* Pierpont testified that he never threatened Epifanio, but he did not go easy on him because the murder was a high-profile case, so Pierpont's demeanor was serious. R8048-49.

At first, Epifanio was very reluctant to talk about the murder and claimed not to know anything about it. R8049-50. Eventually, when Pierpont suggested that Epifanio did know something about the murder, Epifanio confirmed that Carter committed the murder. R8050. Epifanio told Pierpont that he was reluctant to talk about the murder because he was "very fearful"

of Carter or his family coming back and doing something to Epifanio's family. R8053-55,8122. Epifanio expressed his fear of Carter at least 12 times during the interview. R8055.

Pierpont never fed any details about the murder to Epifanio, he only tried to get the truth out of him. R8051-52,8156. But Epifanio tried to get Pierpont to feed him details, which Pierpont refused to do. R8051-53. Eventually, Epifanio admitted that Carter told him "that he homicide a lady." R8053. Epifanio gave Pierpont a detailed description of what Carter told him about murdering Eva. R8055.

Pierpont wanted to know whether Epifanio had any involvement in the murder, so he asked Epifanio questions about details of the murder—sometimes false—to determine what Epifanio's involvement might be. R8057-58. For example, Pierpont asked Epifanio whether Carter stabbed Eva in the neck, and Epifanio explained that Carter did not tell him that. R8056-57. Pierpont was not trying to get Epifanio to agree to false details. R8058. Pierpont told Epifanio that Carter had told him that Carter had been to Eva's house before—even though Pierpont had not talked to Carter at that point—to solicit information from Epifanio, which Epifanio provided when he remembered that Carter told him "she was the Avon lady because his wife sells Avon." R8157;St.Ex.F.45-46. Epifanio did not claim that he knew that

Carter had been to Eva's house before, and Epifanio did not know whether Carter was talking about the same lady. *Id.*

The sole purpose of Pierpont's interview of Epifanio was to get information from him and for Epifanio to tell him the truth, which Pierpont asked Epifanio to do "over and over." R8078-79. Pierpont brought up the death penalty in his interview of Epifanio because he wanted Epifanio to know that it was a death penalty case. R8095-97.

After the recorded interview, Pierpont took Epifanio's written, signed statement of what he told Pierpont about what Carter told him about murdering Eva. R8056. Pierpont revised the written statement as it was being dictated to make sure it was written using Epifanio's words. *See* R8169. And Epifanio willingly signed the written statement as his own. R8056;St.Ex.H.

Pierpont felt that Epifanio was a flight risk because he was in the U.S. illegally and because Epifanio told him that he needed to leave the state. R8060. Epifanio was put in a cell for three or four days, until the county attorney decided whether he wanted to charge Epifanio. *Id.* And Pierpont called the immigration department to see if they could put a hold on Epifanio until after he testified in court because he was worried about Epifanio leaving the state. R8060-61;Pet.Ex.16. Pierpont did not call the immigration

department to find out whether they would deport Epifanio. R8061. Indeed, the Provo Police Department lacked any authority to deport anyone. *Id.*

Pierpont did not speak Spanish, so Mack was assigned, either by Pierpont or Grossgebauer, to keep track of the Tovars and take care of their needs because Epifanio expressed fear of Carter and his family many times. R8061-62. The whole purpose of Mack's assignment was to protect the Tovars. R8062. Pierpont told Epifanio that he would not let Carter, or his family, do anything to harm Epifanio or his family. *Id.* Pierpont was concerned for the Tovars' safety because Carter's whereabouts were unknown when Pierpont interviewed Epifanio, and the gun used to murder Eva was also missing. R8064-68.

To protect the Tovars, all units in the police department did drive-bys. R8063. It was not Pierpont's purpose for the drive-bys to intimidate or harass the Tovars. R8076. And Mack was assigned to check in with them often. R8063-65. Regular check-ins with the Tovars were not something that would have been documented unless something significant had happened. *Id.* The Tovars were asked to check in with Pierpont or with Mack by phone, but Pierpont did not remember having any contact with the Tovars after he interviewed Epifanio. R8064. Later, Pierpont remembered that Epifanio was brought into the police station before the trial and Epifanio revealed that he

threw Carter's gun into a river. R8136-37. Pierpont did not remember whether the Tovars were provided payments like rent, and he did not remember ordering or intending that they receive any payments. R8080. Pierpont did not remember whether he knew Mack was paying the Tovars' rent or groceries, or that Mack gave the Tovars Christmas items. R8109-10.

It was common for the Provo Police Department to offer protection to witnesses or "anybody who felt that they were in jeopardy." R8069. Pierpont did not recall whether there were any written directives, but there was a "confidential expenditure budget" used to protect witnesses. R8069-70. That budget could also be used for drug buys, to pay informants, rent cars, pay for meals, or other things that the police felt obliged to do for witnesses and informants. R8070. Any payments were made in cash, and if documented, there was probably a receipt. R8111,8113.

Pierpont remembered another case before Carter's where the Provo City Police Department provided witness protection, in *State v. Duane and Harley Willett*, a capital homicide case. R8073-74.

Pierpont, who attended Carter's trial, remembered that Epifanio testified that the first time Carter came to his house the night of the murder, Carter said he intended to "rape, break, and drive." R8081-82. Pierpont did not remember hearing that phrase before, he only recalled Epifanio telling

him that Carter said he planned to go out and steal. R8082. Pierpont did not tell Epifanio to say “rape, break, and drive.” *Id.* And Pierpont did not tell Epifanio to testify that Carter intended to commit a sex crime. R8082–83.

Pierpont also testified about his interactions with Perla. One night, Pierpont was at Perla’s house with Officer Mike Mock on a stake out for several hours because the police were interested in interviewing her. R8083–84;Pet.Ex.33. There were two or three young children in the house unattended that required supervision. *Id.* So they called the Division of Family Services (DFS) to take custody of the unsupervised children, which was normal procedure and required under the circumstances. R8085. Pierpont did not call DFS to improve his bargaining position with Perla or to punish, threaten, or intimidate her. R8085–86. Pierpont did not think that the children were removed by DFS after Perla came home. R8087–88. Pierpont never followed up with DFS about their investigation of Perla and her children. *Id.*

When Perla eventually returned home and met the police, she was crying and pretty upset. R8086–87. When Pierpont first spoke with Perla he did not know Perla’s immigration status. R8092. He eventually learned that she tried to get U.S. citizenship. R8092–93. When Pierpont spoke with Perla, he never threatened her in any way. R8083.

Pierpont assigned Mack to interview Perla. R8088. Pierpont remembered Mack arriving, speaking to her in Spanish, and she settled down before Mack did a formal interview of her at the police station. R8086–87,8147. As a result of Mack’s interview with Perla, Pierpont brought Epifanio in for an interview. R8091.

vi. Prosecutor Wayne Watson’s testimony.

Watson testified in a 2016 deposition that he did not know that the Tovars were in the U.S. illegally. Pet.Ex.4 at 9. At first, Watson did not remember that he ever spoke with the Tovars or that they testified at trial. *Id.* at 9–10. After having his recollection refreshed, Watson disagreed that the Tovars were key witnesses because Carter’s wife was the biggest source of information. *Id.* at 10–11. And Pierpont, who took Carter’s confession, was Watson’s number one witness. *Id.* at 11. “The Tovars, I didn’t even need them. I might have thrown them in for extra...source.” *Id.*

When asked about benefits given to witnesses that may not have made it into the prosecution file, Watson thought that “they gave Tovar some rent for a month or two.” *Id.* at 31. He remembered that the Tovars “didn’t have any money, didn’t have a job and had to go—leave Utah to go somewhere else, California, whatever, and that [Provo City] paid their rent in the apartment they were living [in].” *Id.* Watson said that Pierpont told him that

this was happening but did not remember whether he was told before trial.

Id. at 31–32.

Watson agreed that defense counsel should know if the police were paying witnesses' rent, giving witnesses cash, and paying for their utilities.

Id. at 36–37. But Watson was adamant that he told Carter's counsel about these payments. *Id.* at 37–39. Watson remembered two or three meetings with Carter's counsel at his office. *Id.* at 39. Watson believed that Carter's counsel didn't ask the Tovars about these payments because they weren't relevant to Carter's defense theory that "all the white Mormons in Utah...hate black people.... So even though he had these things, he would not have used them."

Id. at 39–40.

Watson agreed that if he knew that Epifanio received more than \$14 he had a duty to correct that at trial. *Id.* at 40. But Watson explained that if he didn't correct it, he "didn't know at the time what the exact amount was." *Id.* Watson also didn't feel the need to supplement Epifanio's answer because he "probably would assume that's coming later if [Carter's counsel] was going to use it." *Id.* at 41.

Watson explained that any witness preparation he did before trial only included him telling the witnesses to "tell the truth." *Id.* at 52–53. And Watson said that the police would not have gone over prior statements with witnesses

before trial because the police “knew from the point they declared them witnesses, they were the county attorney’s witness[es] and you don’t mess with them.” *Id.* at 53.

Watson agreed that it was his handwriting on a note from the Utah County Attorney’s Office’s case file that said: “Epifanio; \$ only deposit on apartment; deposit on phone.” *Id.* at 56;Pet.Ex.3. In the context of questions about whether Watson told Carter’s defense counsel about a grant of immunity for Carter’s wife, Watson explained that the Utah County Attorney’s Office had an open file policy. Pet.Ex.4 at 24–27. Watson had a “distinct recollection of talking to [Carter’s counsel] about this.... We have had in the county attorney’s office since I started...an open file policy.” *Id.* at 27. “And any time we prosecuted a case, defense counsel could come to our office, open our files, and read everything that’s in there.” *Id.*

vii. Gary Weight’s testimony.

Gary Weight testified that his firm was appointed to represent Carter at trial because the firm had the Utah County public defender’s office contract. R7871–72. Eventually Carter hired his own counsel, E. Duke McNeil from Chicago. *Id.* Weight’s firm helped McNeil by enabling him to practice in Utah and gave McNeil access to their materials and provided other

assistance as needed. R7872. Weight was only present during the preliminary hearing and maybe one other trial day. R7872-73.

Weight did not know what the prosecutor disclosed to McNeil or whether McNeil went to the prosecutor's office to review discovery. *Id.* Weight knew that the Utah County Attorney's Office had an open file policy in 1985. R7878. Weight was not involved in the pretrial investigation or involved in discovery. R7876-77. Weight did not discuss discovery with McNeil or the prosecutor. R7877-78.

After the trial, McNeil left the case and Weight's firm handled the appeal. R7873-74. When Weight reviewed Carter's case file on appeal, he did not discover any evidence suggesting that the Tovars had been provided payments or that they had been threatened with deportation or losing their child. R7874. Weight said that if he had seen the note in the prosecutor's file about Epifanio and money deposits, he would have talked to McNeil about it. R7875;Pet.Ex.3. But although Weight knew the Utah County Attorney's Office had an open file policy, he never reviewed the prosecutor's file. R7878.

viii. Michael Esplin's testimony.

Weight's partner Michael Esplin testified that he attended the trial and talked to McNeil about the case. R7886. Esplin also provided McNeil with

local rules and template documents usually filed in capital cases. R7887,7889-90.

Esplin knew that McNeil did some discovery, and they discussed the case's challenges. R7887. They also talked about witnesses, but Esplin's firm made no decisions on what witnesses or theory to present to the jury. R7889. McNeil handled the entire trial. R7889-90. Esplin did not attend the preliminary hearing because he was in military service at the time. *Id.* Most of Esplin's discussions about discovery with McNeil occurred around the preliminary hearing. R7893.

In Esplin's discussions with McNeil about the case, the Tovars played a big role because they offered a lot of testimony that connected Carter to the crime. R7887. Esplin knew that the Tovars were provided \$14. R7887-88. Esplin did not know if the Tovars had been threatened with deportation or with losing their child. R7888. During the time of trial, Esplin had not seen the handwritten note from the prosecutor's file about Epifanio and money deposits. *Id.*;Pet.Ex.3. And McNeil never mentioned it to Esplin. *Id.* Esplin testified that if he had seen this note at the time, he would have sought an evidentiary hearing, got it admitted to the court, and used it to counter the veracity of witness testimony. R7888-89. Esplin knew that the Utah County Attorney's Office's had an open-file policy – though he did not know when it

started and questioned how “open” the policy was – but he never went there to review Carter’s case file. R7893–94.

Esplin never spoke with Watson about the Carter case. R7893. His opinion of Watson was that he had “a bad reputation” and you “could not trust him.” R7885. Esplin did not recall discussing with McNeil any of McNeil’s conversations with the prosecutor. R7893.

ix. Bradley Rich’s testimony.

Bradley Rich testified that he was co-counsel with Jack Morgan on Carter’s first postconviction case. R7853. When Rich joined as co-counsel, he reviewed Carter’s file, which Morgan compiled. R7856–57,7864–65. Rich never found any evidence that the Tovars had been provided with payments or items of financial value other than the \$14 check. R7857–58,7865. Rich never found any evidence that the police threatened the Tovars with deportation or with losing their child. R7858. And Rich admitted that he did not know what was or was not disclosed to Carter’s counsel at the 1985 trial. *Id.*

Rich knew that Morgan went to Chicago to interview McNeil about whether he knew if the Tovars were compensated or threatened for their testimony, but Rich did not go because he was not yet part of Carter’s

postconviction team. R7855,7863. Morgan's notes do not reflect any questions to McNeil about payments made to the Tovars. R7864.

Rich did not make any *Brady* or *Napue* claims in the postconviction petition he filed for Carter. R7864. Rich testified that if he had found out information about the Tovars, he would have included it in Carter's petition. R7856.

Rich testified that he had never seen the handwritten note from the prosecutor's file about Epifanio and money deposits. R7859;Pet.Ex.3. But Rich admitted that he never reviewed the prosecutor's file. R7865. Rich said that had he had this document, it would have countered Epifanio's contention at trial that he received only \$14. R7859. Rich would have tried to find out more about where the note came from and interviewed who wrote it. R7859-60. And it would have alerted him to perhaps raise a claim of either suppression of evidence or another issue. R7860.

In Rich's experience with Wayne Watson, it was his opinion that Watson was an honest person. R7861.

x. Javier Armenta's testimony.

Javier Armenta testified that he went to junior high school with Epifanio, where they were best friends. R7560-61. Epifanio came into the kitchen of the restaurant where Armenta worked before Epifanio testified at

Carter's trial in 1985 about two or three times and told him that the police had moved Epifanio and his family to a different apartment and were providing him with financial aid. R7572-73. Epifanio told Armenta that he was frustrated and scared for his family because "the Provo police will threaten to send his family back" to Mexico or Nicaragua, where Lucia was from. R7572. Epifanio's main concern was whether the police would charge him for helping Carter leave Utah after the murder. R7573-74,76. Epifanio was afraid that if he was charged his son would have no father. R7574-75. Epifanio mentioned that all he needed to do was testify against Carter and the police would leave him alone. R7573. Armenta never said that Epifanio told him that police did threaten him with deportation.

xi. Paul Jones's testimony.

Paul Jones is a Deputy Utah County Attorney. R7836-37. Carter's counsel subpoenaed his office in March 2016, which he responded to in October 2016, disclosing a single handwritten page related to the Carter case. R7837-38. That page read: "Epifanio \$ only deposit on apartment, deposit on phone." R7838. The document was stapled to four other pages. R7839. Jones did not disclose the other pages at first because "the office felt like they were protected by work product," except the one disclosed page, which his office felt fell under the *Brady/Giglio* exception. *Id.* Jones recently disclosed the

remaining four pages to Carter's counsel on September 20, 2021, after speaking with Carter's counsel. R7840-41;Pet.Ex.3. Jones did not know whether the Utah County Attorney's Office would have designated these pages as work product in 1985. R7850-51.

Jones admitted that he knows nothing about the documents he disclosed other than that he found them. R7843. He does not know when the notes were created or when they were placed in the box that he found them in. *Id.* The box had a lot of handwritten notes in it, but it was not labeled "attorney work product" and only had a number on it. R7845-46. And there was nothing in the documents or where he found them in the case file that would suggest whether defense counsel reviewed them. *Id.* The Carter file consisted of eight boxes labeled with numbers consecutively, and the box that contained the disclosed pages is labeled number five. R7847-49.

4. Carter's motion to amend his postconviction petition.

In his post-evidentiary hearing briefing, Carter raised and discussed for the first time a *Napue* claim about Epifanio's "rape, break and drive" trial testimony. R8256-57. Respondent argued that it was untimely and procedurally barred under the PCRA because Carter could have raised that claim at trial, on appeal, or at the very latest in a previous postconviction petition because he knew that Epifanio did not tell Pierpont that in his police

interview before trial. R8483–85. Carter responded that it was not barred because he could not have raised the claim until Epifanio testified at his deposition that someone told him to say “rape, break and drive.” R8566.

In closing argument, the district court advised Carter’s counsel that the “rape, break and drive” claim could stand alone as a *Brady* and *Napue* claim “if we have an amendment to the papers.” R8699. At the hearing’s end, for the first time Carter’s counsel brought up his intention to amend the petition to add the standalone *Napue* claim about the “rape, break, and drive” testimony, and the court suggested that counsel file a “Rule 15 motion to conform to the evidence.” R8795.

Respondent opposed the motion because (1) it did not consent, implicitly or explicitly, to the new *Napue* claim, (2) adding the new *Napue* claim at such a late stage in litigation prejudiced Respondent because it could not ask the guilt-phase trial or resentencing prosecutors about what they knew about Epifanio’s “rape, break and drive” testimony, and (3) the motion was procedurally defective because it didn’t include a copy of the amended

petition. R8637–50.⁶ The court granted Carter’s motion to amend the petition. R8817.

5. The district court’s ruling and order granting Carter’s postconviction petition.

The district court granted Carter’s petition for postconviction relief and vacated his murder conviction and death sentence. R8946.

i. Carter’s *Brady* claims.

The court ruled that the State violated *Brady* because it failed to disclose to defense counsel (1) financial benefits the police paid to the Tovars, (2) threats by police to the Tovars to arrest, deport, and separate them from their son, (3) that the police coached the Tovars not to disclose at trial the financial benefits, and (4) that the police coached Epifanio to testify at trial that Carter said he was going to “rape, break, and drive” the night of the murder. The court concluded that the evidence favored Carter and was suppressed. R8929–30.

⁶ Respondent did not oppose Carter amending the petition to add a *Brady* claim that the State failed to disclose that Epifanio was coached to say Carter was going to “rape, break, and drive” before the murder. As the district court pointed out, Carter’s original petition claimed that the State coached the Tovars’ testimonies and this Court suggested “rape, break, and drive” may have been coached by the State. R8817 n.1 (citing *Carter VI*, 2019 UT 12, ¶67).

On guilt-phase prejudice, the court ruled that Carter “failed to show a reasonable probability that disclosure of the financial benefits and threats would have resulted in a different verdict.” R8933. On Carter’s coaching claims, the court said that *Brady*’s materiality standard “differs depending on the type of evidence suppressed” and that “the materiality of these nondisclosures is presumed and the burden shifts to the State to show that the failures to disclose were ‘harmless beyond a reasonable doubt.’” R8930,8934. The court concluded that the “State has failed to meet this burden,” so “Carter has proved his conviction was obtained in violation of *Brady*.” R8934,8940. And the court ruled that “Carter’s death sentence was obtained in violation of *Brady*” because the “State has failed to prove that its failure to disclose” that Epifanio’s “rape, break and drive” testimony was coached “was harmless beyond a reasonable doubt.” R8943.

ii. Carter’s *Napue* claims.

The district court found that Watson and Pierpont knew that Epifanio testified falsely when he said he only received a \$14 witness fee and that Pierpont knew Epifanio testified falsely when he testified that Carter said he was going to “rape, break, and drive.” R8944. It imputed this knowledge to Watson, found that Watson failed to correct it, and that failing to correct it “could have resulted in a different outcome both in the guilt phase and

sentencing phase of Carter's trial." *Id.* The court used *Napue's* "less demanding" materiality standard to conclude that "the State's failure to correct Epifanio's coached false testimony could have resulted in a different outcome both in the guilt phase and sentencing phase of Carter's trial" for "the reasons stated above" in the court's *Brady*-prejudice analysis. R8944-45. Though the court found that Carter did not prove that Watson knew Epifanio testified falsely when he said Carter said he was going to "rape, break, and drive," the court determined that a police investigator's knowledge that he coached a witness to testify falsely should be imputed to the prosecutor. R8945 n.12.

SUMMARY OF ARGUMENT

I. *Brady* prejudice standard error. The district court correctly ruled that Carter didn't prove prejudice from any undisclosed payments or threats to the Tovars because he failed to show a reasonable probability that disclosure would have resulted in a different verdict. But the court erred when it said that Carter's other *Brady* claim—that the State failed to disclose that police coached Epifanio to testify falsely—required a different materiality standard, where materiality is presumed and the burden shifts to the State to show that the failures to disclose were harmless beyond a

reasonable doubt. The court concluded that the State failed to meet that burden, so Carter proved a *Brady* violation.

The court was wrong to vacate Carter's murder conviction and death sentence based on its conclusion that the State did not prove that any undisclosed coached testimony was harmless beyond a reasonable doubt because the State has no burden to prove anything in postconviction. Under the PCRA, Carter had to prove a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

And the court's error also infected its limited *Napue* prejudice analysis because it rested only on its error-ridden *Brady* analysis. The court also erred by ruling that police knowledge of false testimony is imputed to the prosecutor in a *Napue* claim.

The court made many factual errors, but even taking the district court's findings as correct, on the entire record, Carter did not prove that any *Brady* or *Napue* violation prejudiced him at the guilt or sentencing phases. Therefore, the court erred when it granted Carter's postconviction petition.

II. Post-evidentiary hearing amendment. The district court abused its discretion when it advised Carter to amend his petition with a new *Napue* claim about Epifanio's "rape, break and drive" testimony and allowed Carter

to do it ten years after filing his petition, after discovery, and after the evidentiary hearing, post-hearing briefing, and arguments concluded. Respondent did not consent, either implicitly or explicitly, to this new *Napue* claim. And adding this new claim prejudiced Respondent because by that advanced stage of the proceedings it could not ask the guilt-phase or resentencing prosecutors if they had any knowledge as to whether Epifanio's "rape, break and drive" testimony was false. Whether the prosecutors knew if Epifanio's testimony was false is a necessary element of any *Napue* claim. And the court's error was not harmless because it based its ruling and order vacating Carter's criminal judgment in part on the illegitimate amendment.

III. Mandate rule. The district court reconsidered its pre-appeal rulings sustaining objections to Wayne Watson's deposition testimony after this Court affirmed those rulings and remanded. It erroneously conflated the inflexible mandate rule with the general law-of-the-case doctrine and its limited exceptions. If the mandate rule applied, as the court correctly determined it did, then no exceptions allowed the court to reconsider its pre-appeal rulings after remand. So the district court's pre-appeal rulings must stand. And the error was not harmless because after violating this Court's mandate, the court relied on testimony it was precluded from considering when it determined Watson's credibility.

ARGUMENT

I.

The district court applied an incorrect *Brady* prejudice standard and erroneously shifted Carter's burden to prove that he is entitled to postconviction relief onto Respondent; on the entire record, Carter did not prove any *Brady* or *Napue* violation prejudiced him at the guilt or sentencing phases.

The district court erroneously said that *Brady's* "materiality standard differs depending on the type of evidence suppressed," where the materiality of alleged undisclosed coached testimony, "is presumed and the burden shifts to the State to show that the failures to disclose were 'harmless beyond a reasonable doubt.'" R8930,8934. The court ruled that the "State has failed to meet this burden," so "Carter has proved his conviction was obtained in violation of *Brady*." R8934,8940. And the court ruled that "Carter's death sentence was obtained in violation of *Brady*" because the "State failed to prove that its failure to disclose" that Epifanio's "rape, break and drive" testimony was coached "was harmless beyond a reasonable doubt." R8943.

But the United States Supreme Court rejected a *Brady* materiality standard that is different depending on the type of evidence suppressed. *United States v. Bagley*, 473 U.S. 667, 682 (1985). The *Brady* materiality standard is always the same: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* This tracks the PCRA's

general prejudice standard too, which prohibits postconviction relief unless the petitioner proves that there would be a reasonable likelihood of a more favorable outcome without the alleged error. Utah Code Ann. § 78B-9-104(2)(a).

Thus, the district court erroneously vacated Carter's murder conviction and death sentence because the State did not have any burden to prove anything in postconviction. *See* Utah Code Ann. § 78B-9-105. *Carter* had to prove a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. And the court's error also infected its *Napue* prejudice analysis because its limited analysis there rested entirely on its error-ridden *Brady* analysis.

Even taking the district court's factual findings as correct, on the entire record, Carter did not prove that any *Brady* or *Napue* violation prejudiced him at the guilt and sentencing phases.

Whether reviewing his conviction and sentence given the alleged suppression of impeachment evidence (*Brady*) or the prosecutor's alleged knowing failure to correct false testimony at trial (*Napue*), this Court should retain confidence in the verdict and sentence. Had Carter put before the jury all the facts he put before the district court, the jury would have had no reason to doubt Carter's guilt and death-worthiness given the totality of the

evidence. Carter's unchallengeable confession and the Tovars' consistent and truthful corroboration of that confession entirely mitigate any unease a jury would have about the Tovars' truthfulness. Whether (1) Epifanio was coached to lie about payments he received or (2) the Tovars both had incentives to lie based on threats, coaching, or payments, they *did not lie* about Carter's confession to them, and any jury would have believed that and reasonably determined that the evidence still proved Carter guilty beyond a reasonable doubt. As the district court recognized, at the evidentiary hearing, the Tovars "stood by their testimony that Carter had returned to their home and confessed to murdering the victim." R8933.

And the district court wrongly disregarded Perla's pretrial statements—which showed Epifanio fully inculpated Carter before any incentive to fabricate or coaching could have arisen—when it considered hypothetical legal strategies where the prosecutor decides not to call Perla to testify. The court had to consider the totality of the evidence bearing on prejudice. Perla's pretrial statements corroborated the Tovars' testimony and Carter's confession corroborated both. The Tovars stand by their testimony today.

What's more, the court's prejudice conclusion under *Napue* lacks any analysis whatsoever. It merely rests on its incorrect *Brady*-prejudice analysis.

And the court's *Napue*-prejudice conclusion disregarded all the evidence. Carter himself persuasively proved his own guilt beyond a reasonable doubt irrespective of any tainted, corroborating witness testimony. Had the prosecutor corrected any false testimony, whatever taint Epifanio's and Lucia's credibility had would have been vastly outweighed by an undeniable reality. Epifanio, Lucia, Perla, and Carter himself all agreed on the same basic facts: that Carter murdered Eva, told Epifanio what he had done, and Epifanio told Perla before any police contact. And the Tovars still stand by their testimony about the crime facts, even though any incentive they might have had to lie about Carter has long since evaporated.

Given the strength of Carter's confession and its concordance with the crime scene and the Tovars' recitation of Carter's confession to them, no reasonable jury, even doubting the Tovars' credibility in some general sense, could have doubted their credibility on the corroborating accounts they gave of Carter's confession to them about committing the murder, and not enough to raise a reasonable doubt about his guilt or candidacy for a death sentence. The district court erred by ruling otherwise.

A. The district court applied an incorrect prejudice standard and erroneously shifted Carter's burden onto Respondent; this error also infected its *Napue* prejudice analysis.

Carter raised claims under *Brady* and *Napue*, each of which requires separate analyses of different universes of evidence. The *Brady* standard applies to alleged suppression of evidence with which Carter's trial counsel could have impeached either Tovar's trial testimony, including alleged payments, threats, and coaching. The *Napue* standard applies only to allegations that the prosecutor knowingly failed to correct Epifanio's false testimony.

1. The court applied an incorrect prejudice standard and erroneously shifted Carter's burden of proof onto Respondent.

The district court said that the *Brady* "materiality standard differs depending on the type of evidence suppressed." R8930. It said that "[i]f the prosecutor knowingly fails to disclose that testimony used to convict the defendant is false, 'the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.'" R8930 (quoting *Bagley*, 473 U.S. at 680). Then, the court erroneously reasoned that "prejudice is presumed and is only rebutted if the State can show that failing to disclose the false testimony was harmless beyond a reasonable doubt." R8930.

But there isn't a different *Brady* prejudice standard "depending on the type of evidence suppressed." Indeed, *Bagley* rejected its previous framework in *United States v. Agurs*, 427 U.S. 97 (1976), which did just that, and announced the one-size-fits-all *Brady* prejudice standard in *Strickland*.

In *Bagley*, the Supreme Court explained how in *Agurs* it had once evaluated the materiality of *Brady* evidence differently in three situations: (1) "the prosecutor's knowing use of perjured testimony"; (2) where "the defendant does not make a *Brady* request and the prosecutor fails to disclose certain evidence favorable to the accused"; and (3) "the defense makes a specific request and the prosecutor fails to disclose responsive evidence." *Bagley*, 473 U.S. at 678–81.

In the first scenario, the *Bagley* court characterized *Agurs'* materiality standard to be like "harmless-error review," where knowing use of perjured testimony "is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *Id.* at 679–80.⁷ In the second, the materiality standard was "stricter than the harmless-error standard but more lenient to the defense than the newly-discovered-evidence standard." *Id.* at 681. Finally, the *Agurs'* Court "did not define the standard of materiality

⁷ This was just a restatement of the less-stringent *Napue* prejudice standard. See *id.* at 679–80 n.9.

applicable” when the prosecutor fails to disclose evidence specifically requested by the defense, “but suggested that the standard might be more lenient to the defense than in the situation in which the defense makes no request or only a general request.” *Id.* (citing *Agurs*, 427 U.S., at 106).

The Supreme Court noted how it “relied on and reformulated the *Agurs* standard for the materiality of undisclosed evidence in two subsequent cases arising outside the *Brady* context” in *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982) (testimony unavailable because the government deported witness), and *Strickland v. Washington*, 466 U.S. 668 (1984) (evidence not introduced because of ineffective assistance of counsel), and that “neither...distinguish[ed]” between different types of undisclosed evidence. *Bagley*, 473 U.S. at 681–82. Then the Court held that *Strickland*’s prejudice standard was “sufficiently flexible to cover the ‘no request,’ ‘general request,’ and ‘specific request’” *Brady* claims: “The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 682. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. *Id.*

Indeed, the dissent in *Bagley* proposed doing exactly as the district court did here: placing the burden on the prosecutor. *Id.* at 705–07 (Marshall,

J., dissenting). But even the dissent acknowledged that under current law, it was the defendant who would “later shoulder the heavy burden of proving” how undisclosed evidence “would have affected the outcome of the trial.” *Id.* at 701.

Thus, the district court erred and misinterpreted *Bagley* when it (1) identified different materiality standards “depending on the type of evidence suppressed” and (2) required Respondent to “show that failing to disclose the false testimony was harmless beyond a reasonable doubt.” R8930. The court’s prejudice standard conflicts with law because it flips the petitioner’s burden under Supreme Court case law, this Court’s case law and prior ruling in Carter’s case, and the PCRA on its head.

A *Brady* violation has three elements: (1) evidence must favor the accused; (2) be suppressed by the State; and (3) the defendant suffered prejudice. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). The third element is “whether the *petitioner* has established the prejudice necessary to satisfy the ‘materiality’ inquiry.” *Id.* at 282 (emphasis added). *See also Banks v. Dretke*, 540 U.S. 668, 699 (2004) (“[Petitioner] must show a ‘reasonable probability of a different result.’”) (citation omitted).

As this Court already ruled in *Carter’s* last appeal, “[t]o demonstrate prejudice under *Brady*, the accused must show that the suppressed, favorable

evidence is material.” *Carter VI*, 2019 UT 12, ¶50. And “the materiality standard under *Brady* is the same materiality standard contained in the PCRA.” *Id.* ¶55.

Under the PCRA, “the petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.” Utah Code Ann. § 78B-9-105(1)(a). Respondent’s only burden “is pleading any ground of preclusion under” the PCRA’s procedural bars. *Id.* § 78B-9-105(2). But even then, “once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.” *Id.*

And the PCRA’s general prejudice provisions prohibit relief “unless in light of the facts proved in the postconviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing, *the petitioner establishes* that there would be a reasonable likelihood of a more favorable outcome” without the alleged error. *Id.* § 78B-9-104(2)(a) (emphasis added).

Thus, *Carter* had to prove that any alleged undisclosed coached testimony “‘undermines confidence’” in the trial outcome. *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). And he must have done so “in the context of the entire record.” *Tillman v. State*, 2005 UT 56, ¶32, 128 P.3d 1123. “While courts may ‘evaluate the tendency and force of the undisclosed

evidence item by item,’ it is the collective weight of the evidence that is considered when evaluating materiality.” *Carter VI*, 2019 UT 12, ¶53 (quoting *Kyles*, 514 U.S. at 436 & n.10). The State had no statutory or constitutional burden at all.

On Carter’s *Brady* claims about undisclosed financial benefits and threats, the district court correctly ruled that Carter “failed to show a reasonable probability that disclosure of the financial benefits and threats would have resulted in a different verdict.” R8933. “[S]trictly speaking, there is never a real ‘*Brady* violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” *Strickler*, 527 U.S. at 281. Yet the court erroneously said that because the “State knowingly failed to disclose” Epifanio’s testimony about only receiving a \$14 witness fee before trial and Carter saying he was going to go “rape, break and drive” before the murder “was false and coached by police,” “the materiality of these non-disclosures is presumed and *the burden shifts to the State* to show that the failures to disclose were ‘harmless beyond a reasonable doubt.’” R8934 (emphasis added).

The court concluded that the “State failed to meet this burden.” *Id.*;R8939. Based on this erroneous standard, the court wrongly ruled that

“Carter’s death sentence was obtained in violation of *Brady*” because the “State failed to prove that its failure to disclose” that Epifanio’s “rape, break and drive” testimony was coached “was harmless beyond a reasonable doubt.” R8943.

The district court conflated the less-stringent *Napue* prejudice standard to a *Brady* claim about coaching. The *Brady* evidence Carter claimed wasn’t disclosed was that pretrial, the police coached Epifanio to say that he only received \$14 and to say “rape, break and drive.” The *Brady* claims would still fall under the normal *Brady/ Strickland* prejudice standard, as *Bagley* explains. Once Epifanio testified falsely about those things, then they became *Napue* claims analyzed under its less-stringent prejudice standard.

Again, when raising a *Brady* claim, it is the petitioner’s burden to prove prejudice. And under the PCRA, it is Carter’s burden to prove by a preponderance of the evidence that he is entitled to relief. Utah Code Ann. §§ 78B-9-105(1)(a), 104(2)(a). Respondent does not have to prove anything. The district court could not have granted Carter postconviction relief unless Carter proved that any failure by the State to disclose coached testimony prejudiced him. Thus, the court erroneously ruled that Carter suffered prejudice on these *Brady* claims only because Respondent did not prove otherwise. See R8939–40 (“In summary, the State has not shown that its failure

to disclose Epifanio's coached false testimony would have been 'harmless beyond a reasonable doubt,'" so "the Court concludes that Carter has proved his conviction was obtained in violation of *Brady*").⁸

2. The district court's *Brady* prejudice error also infected its limited *Brady*-dependent *Napue* prejudice analysis.

Since Carter "challenges the conviction or the sentence on grounds that the prosecutor knowingly failed to correct false testimony at trial or at sentencing," the PCRA prohibits relief "unless in light of the facts proved in the postconviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing," Carter "establishes that the false testimony, in any reasonable likelihood, could have affected the judgment of the fact finder." Utah Code Ann. §§ 78B-9-104(2)&(2)(b).

Though the district court did not reference the PCRA when it articulated the prejudice standard for Carter's *Napue* claims, the court was essentially correct when it stated that to "prove a *Napue* violation, Carter must show that the prosecutor knowingly failed to correct false testimony, and that this failure could have resulted in a different outcome." R8944.

⁸ In similar form, the district court erroneously held the State to a burden of proof when it rejected Respondent's argument that it was unlikely that police told Epifanio to say "rape, break and drive" because it is syntactically awkward and therefore more likely of Spanish origin because Respondent did not present "expert testimony about linguistics or the origin of English or Spanish words." R8925. Again, Respondent has no burden.

But for all the reasons the district court was wrong to find that Carter proved his *Brady* claims because Respondent did not prove otherwise, the court's analysis of Carter's *Napue* claims is wrong because it hinged in turn on its error-ridden *Brady* analysis.

Indeed, the court's entire discussion of Carter's *Napue* claims is only about one-and-a-half pages. *See* R8943–45. Any actual analysis is only two paragraphs. *See* R8944–45. That's because the court used *Napue*'s "less demanding" materiality standard to rest its conclusion that "the State's failure to correct Epifanio's coached false testimony could have resulted in a different outcome both in the guilt phase and sentencing phase of Carter's trial" only on "the reasons stated above." R8945. But those reasons rest entirely on the court's incorrect prejudice analysis of Carter's *Brady* claims, where the court ruled for Carter because Respondent did not prove that it was harmless. R8945. Thus, the court infected its *Napue* conclusions with its error-ridden *Brady* analysis too.

B. Given the entire record, Carter did not prove a reasonable likelihood of a more favorable result at trial had any alleged coached testimony been disclosed.

The district court ruled that the State violated *Brady* when it failed to disclose to defense counsel (1) financial benefits police paid to the Tovars, (2) threats by police to the Tovars to arrest, deport, and separate them from

their son, (3) police coaching the Tovars not to disclose at trial the financial benefits, and (4) police coaching Epifanio to testify at trial that Carter said he was going to “rape, break, and drive.” R8929–40.

On guilt-phase prejudice, the court correctly ruled that Carter “failed to show a reasonable probability that disclosure of the financial benefits and threats would have resulted in a different verdict.” R8933. But it then erroneously ruled that the State failed to meet its burden “to show that the failures to disclose were ‘harmless beyond a reasonable doubt,’” because “Carter’s conviction was secured – at least in part – on the basis of [Epifanio’s coached,] false testimony,” about his \$14 witness fee and Carter saying he was going to “rape, break, and drive.” R8934.

As discussed, the district court’s *Brady* prejudice standard for the undisclosed coached testimony is wrong. Carter, not the State, had the burden to prove his claims. The State had no burden.

Under the correct standard, and considering the entire record, Carter did not prove a reasonable likelihood of a more favorable result had the jury been told that the police coached Epifanio to say he only received \$14 or to say that Carter said he was going to “rape, break and drive.” See Utah Code Ann. § 78B-9-104(2)(a). Indeed, Carter’s conviction was *not* secured based on

that testimony. It was secured on Carter's incontrovertible and now-unchallengeable confession and its consistency with the evidence.

And even if the evidence could have provided some other basis to ask the jury to disbelieve the Tovars, it wouldn't have mattered. Their critical testimony—what Carter told and showed them he had done—was cumulative of and corroborated by Carter himself. Neither the Tovars nor Carter himself have ever recanted their reports. As the district court acknowledged, the Tovars “stood by their testimony that Carter had returned to their home and confessed to murdering the victim.” R8933. The Tovars' testimony materially tracked Epifanio's earlier statements to Perla before any alleged incentive to fabricate arose. As the court recognized, the “Tovars do not claim to have lied because of the financial benefits paid to them or because of the threats of arrest, deportation, and separation from their son.” *Id.* The Tovars also never claimed to have lied about Carter's confession because police coached Epifanio. In fact, both Epifanio and Lucia testified that they told the truth at trial when they testified about Carter's confession of murder to Epifanio and Carter's demonstration about what he had done. Pet.Ex.1 at 50,80–88;R7625–26,7629.

1. The district court erroneously discounted Perla's statements to police corroborating Epifanio's testimony before there were any payments, promise of payments, alleged threats, or alleged coaching.⁹

Perla's statement to police seriously undermines any impeachment value Carter could have gained by eliciting evidence that Epifanio was allegedly paid, threatened, or coached before he testified at trial. This is so because it showed that Epifanio was telling the same story before there were any payments, promise of payments, alleged threats, or alleged coaching.

Epifanio's account of Carter's confession to him was never called into serious question at trial. Mostly this was because Carter himself confirmed to Pierpont that he confessed the murder details to Epifanio.

Had Epifanio's testimony about Carter's confession to him come under any cloud of suspicion because of payments, threats, or coaching, however,

⁹ The district court also abused its discretion when it refused to admit Perla's entire recorded statement to Mack. R7926,7942,8008-10. Her statement was admissible under rule 801(d)(1)(A) as a prior inconsistent statement because she denied remembering anything she said in her statement to Mack. It was also admissible under rule 801(d)(1)(B) as prior consistent statements made by Epifanio, offered to rebut a charge of recent fabrication, improper influence, or motive because the statements were made before the time a motive to fabricate arose. And the entire statement should have been admitted under rule 106 and the rule of completeness because Carter's counsel asked Perla questions on cross-examination using quotes from other parts of her recorded statement that the district court did not allow the State to confront Perla with on direct or re-direct examination. R7986-89,7998.

the prosecutor would have sought to rehabilitate him. Calling Perla to testify would have shown that Epifanio recounted Carter's confession before any police interaction and any State-sponsored incentive to lie or embellish. Perla's interview with Mack was the best available evidence of what Epifanio said about the murder before he met with police.

The Court must weigh the probabilities of the effects of counterfactual evidence on the jury. *See, e.g., Ross v. State*, 2019 UT 48, 448 P.3d 1203. Yet the district court erroneously insisted that the "focus of *Brady* prejudice analysis encompasses the impact of the suppressed evidence would have had on trial strategy if disclosed." R8932 (citing *Guzman v. Sec'y Dep't of Corr.*, 663 F.3d 1336, 1353 (11th Cir. 2011)).

The court ruled that "Epifanio's pre-motive consistent statements to Perla would have mitigated the argument that the financial benefits or threats caused Epifanio to fabricate his testimony" because "[m]any of these statements to Perla were generally consistent with Epifanio's trial testimony implicating Carter." R8936. But the court concluded that "introducing counter-factual proof through Perla would have come at a cost" because now, "Perla is an inconsistent, recalcitrant witness with a strong bias in favor of Carter" and her "lack of memory – whether legitimate or feigned – and the cause of that memory loss would be placed in issue," including her claim that

“the trauma she experienced when police threatened to deport her and take her children away” is “[o]ne reason Perla claims to lack memory. *Id.* The court ruled that “[e]vidence of specific threats made to her by Pierpont and Mack would be admitted, further tarnishing the police investigators and their investigation generally.” *Id.*

Then the court concluded that the “down-sides of presenting counter-factual proof raise serious questions about whether a reasonable prosecutor would make the strategic choice to call Perla as a witness for this purpose.” R8936–37. But asking whether the Court can retain confidence in the outcome requires it to consider *all* the known evidence, not to simply ask how the litigants would have “played [their] cards differently.” *Ross*, 2019 UT 48, ¶93. This proceeding is a search for the truth, not just a war game in which the court runs through the players’ strategies to see who wins. Fairness and a reliable verdict, not the probable gamesmanship of idiosyncratic litigants, is the focus.

Indeed, the Supreme Court has said that “[i]n evaluating [prejudice], it is necessary to consider *all* the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path.” *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam). And under *that* inquiry, this Court “look[s] back to what would have happened at” the petitioner’s “original trial, *but we*

do it with the benefit of what we know thanks to the evidentiary hearing.” Ross, 2019 UT 48, ¶90 (emphasis added). If the reviewing court did not consider prejudice including all the known evidence, that “would improperly and artificially compartmentalize the inquiry.” *Id.* ¶92.

The analogous prejudice inquiry under “*Strickland* instructs that the ‘ultimate focus of [the] inquiry must be on the fundamental fairness of the proceeding whose result is being challenged,’” or, stated another way, whether the alleged error “undermines our confidence in the outcome.” *Id.* ¶93 (quoting *Strickland*, 466 U.S. at 696) (alteration in original). The question is not, as the district court formulation would have it, simply whether a different result could have been obtained had things gone differently. *Id.* Indeed, the court’s reasoning is the “sporting chance” theory of criminal justice the Supreme Court has derided. *See Brady v. Maryland*, 373 U.S. 83, 90 (1963) (rejecting the defendant’s “sporting chance” “theory of justice”).

Thus, the court erred both when it considered whether the prosecutor likely would have called Perla in rebuttal and when it dismissed Perla’s statements on the assumption that the prosecutor would not have called her. Instead, the court had to consider “what we know thanks to the evidentiary hearing,” Ross, 2019 UT 48, ¶90, including Perla’s statements to police, to assess whether it can retain confidence in Carter’s conviction and sentence.

Perla's testimony is in evidence, and it bears on the fundamental reliability of the judgment. That is what the court had to consider.

In any event, the evidence does not support the district court's guess that the prosecution would not have called Perla in rebuttal. For one thing, Carter never asked the prosecutor, Wayne Watson, about this when he had the chance before Watson died. Carter's counsel never mentioned Perla at Watson's deposition. *See* Pet.Ex.4. If Carter could prove Watson would not have called Perla, that's the obvious place to start. It is, after all, Carter's burden to prove prejudice. And if he intended to prove it based on what the prosecutor would not have done, he needs proof of that. He forfeited his opportunity to get it, so the court was left to speculate. Speculation is not proof. *Cf. Burt v. Titlow*, 571 U.S. 12, 22–23 (2013).

And if coaching evidence were as devastating to the State's case as the court suggests it would be, leaving the State with a loser of a case, then what incentive would the prosecutor have to withhold Perla's statements from the jury?

What's more, the court incorrectly considered Perla's counter-factual evidence as if Perla would testify in the 1985 trial as she did in 2021. That is the wrong standard. "[I]t is appropriate to consider the impact the State's rebuttal evidence would have had *if it had been presented at [Carter]'s original*

trial.” *Ross*, 2019 UT 48, ¶78 (emphasis added) (citing *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam)). Closer in time to the murder, Perla told police and the magistrate everything Epifanio told her, and there is every reason to believe she would have told the jury as well. Now Perla can afford to be friends with a vicious killer who is safely behind bars; before and during a trial with an uncertain outcome, that was a much riskier proposition.

And even if Perla showed the same obstreperousness at trial as she showed at the evidentiary hearing, the prosecution could have done exactly as Respondent did here: read back the transcript of her recorded interview with Mack, or more likely played the tape with a Spanish interpreter.

Finally, the district court’s credibility findings about Perla are contradictory and clearly wrong. The court correctly found Perla’s lack of memory about what Epifanio told her about Carter murdering Eva “implausible” based on her “strong bias in favor of Carter” because she “has maintained contact with Carter, exchanging letters with him, speaking to him on the phone,” “just two weeks before her testimony at the hearing,” and put “money on his commissary account...approximately two years ago.” R7808–10,7920,7926–27. Yet the court credited Perla’s testimony that her lack of memory was caused by “the trauma she experienced when police threatened to deport her and take her children away.” R8936. Thus, the court suggested

that “[e]vidence of specific threats made to her by Pierpont and Mack would be admitted, further tarnishing the police investigators and their investigation generally.” R8936.

But the court’s finding that Perla experienced “trauma” “when police threatened to deport her and take her children away” is clearly erroneous and this Court should disregard it. *See* Utah R. Civ. P. 52(a)(4) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the credibility of the witnesses.”). To prove that the district court’s findings are clearly erroneous, Respondent “must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court’s findings are so lacking in support as to be ‘against the clear weight of the evidence.’” *Matter of Est. of Bartell*, 776 P.2d 885, 886 (Utah 1989) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)).

The court’s only evidence supporting its finding that Perla experienced “trauma” in connection with this case is her own testimony “that she was ‘really scared’ when interviewed by police in 1985,” and when “‘police came into my house with the gun looking for [Carter], and the intimidation they’re going to take my kids away.’” R8909. There is no other evidence that the police entered Perla’s house with guns drawn. The police were staking out

Perla's apartment because they suspected that Perla's car may have been involved in the murder. Pet.Ex.33. But after speaking with police officers after she returned, Perla "allowed the officers to enter the apartment" to look for Carter. *Id.* at 2. That evidence contradicts Perla's testimony that the "police came into her house with" guns, or at least her intimation that police burst down the door with guns drawn, causing her trauma.

And the court points to no contemporaneous evidence that Perla believed she was threatened with deportation, arrest, or loss of her children when she spoke to Mack. The only contemporaneous evidence is that Pierpont called DFS because of Perla's demonstrated neglect of her minor children when she left them alone to help Epifanio drive Carter out of the State—before she even spoke to police—and that he had no responsible choice but to do so. *Id.*; R8085. Pierpont testified that he never threatened Perla in any way. R8083. Mack never testified that he threatened Perla. And Carter stipulated that nowhere in the recorded interview between Mack and Perla does Mack threaten Perla with deportation or the loss of her children. R8001. The only evidence that anyone threatened Perla is her own incredible and motivated testimony at the evidentiary hearing that Mack threatened her with deportation and loss of her children. R7999. But Perla never testified that Pierpont threatened her. And Perla's children were apparently not removed,

she was not arrested, she was not threatened during her recorded interviews, and she never said she was threatened at all until decades later. By then, she was Carter's partisan, keeping up a lively and decades-long correspondence with him, even giving him money.

Moreover, Perla's testimony was so biased in Carter's favor that she feigned forgetfulness when asked about what Epifanio told her about Carter confessing to murdering Eva, that any testimony about *why* she can't remember can't be trusted either. Any jury would see Perla's transparent efforts to bolster Carter's case – which hinges on allegations of police threats and misconduct—as unbelievable. The court clearly erred when it found otherwise.

Perla lied about almost everything she said in support of Carter at the evidentiary hearing. She was lying about being threatened too. Because the court referenced no evidence of such threats that was contemporaneous with those events, and no *reliable* evidence at all, the court's credibility findings on this issue were clearly erroneous and it should have disregarded that testimony entirely.

In sum, the district court erred in how it considered Perla's statements to police that rehabilitated Epifanio's trial testimony. And its credibility findings about Perla to support its theory as to why the State would not call

Perla or why her testimony would not help the State was clearly erroneous. This Court can have confidence in the verdict and sentence in part because, irrespective of any payments, coaching, or threats to the Tovars, those issues arose only after Epifanio already told Perla about Carter's confession to him. Perla's statement to Mack has not been undermined in any meaningful way. And Epifanio confirmed that he talked to Perla about Carter's confession to him on the trip home from Wendover. *See* Pet.Ex.1 at 42. The Tovars' trial testimony about Carter's confession of murder remains reliable regardless of any allegations of *Napue* or *Brady* violations.

2. Given Carter's confession and the unrelenting consistency between the Tovars' pre-police statements, trial testimony, and evidentiary hearing testimony, there is no reasonable likelihood of a more favorable result at trial.

Again, any evidence of coaching, even if true, cannot prove prejudice. Even if the evidence could have provided some other basis for the jury to discredit the Tovars, it wouldn't have mattered. Their critical testimony – what Carter told and showed them he had done – was merely corroboration of Carter's confession. They have never recanted that testimony. And it materially tracked Epifanio's earlier statements to Perla before any alleged incentive to fabricate arose. Thus, Epifanio's trial testimony wouldn't have been as tainted by police coaching as the court insisted.

i. Epifanio stands by everything he said at trial about Carter's guilt with no continuing incentive to fabricate or embellish.

During his 2020 deposition, Epifanio confirmed almost everything he said at trial about Carter's guilt. *See generally* Pet.Ex.1. And he maintained his incrimination of Carter with no continuing incentive to fabricate or embellish. He confirmed that Carter paid the Tovars two visits the night of the murder, both before and after committing murder. *Id.* at 23. During the first visit, Carter revealed his intent to break into a car and steal. *Id.* at 20–21. And during the second visit, Carter confessed to killing Eva and was nervous. *Id.* at 36,80.

Epifanio confirmed that Carter told Epifanio that Carter (1) knocked at a house and the lady who answered the door looked at him like she was prejudiced, *id.* at 80–81; (2) stole nothing, *id.* at 81; (3) went into the house and the lady grabbed a knife, *id.*; (4) took the knife away and made her lie on the floor, *id.*; (5) stabbed her in the back perhaps ten times, but he wasn't sure how many, *id.*; (6) shot her in the head because the lady wouldn't die, *id.* at 81–82; (7) grabbed a pillow and pulled the trigger, but the pillow blocked the hammer, so he moved the pillow and pulled the trigger, *id.* at 82; and (8) didn't leave any fingerprints, *id.* at 82–83.

Epifanio confirmed that when Carter came back to his house on the night of the murder the second time, Carter “was wearing different clothes and he had just showered,” *id.* at 83; lay on the living room floor and demonstrated what he had done to Eva, *id.* at 87; and “was laughing because he was nervous,” *id.* at 87–88. And Epifanio confirmed that Lucia was in the same room when Carter was telling Epifanio about murdering Eva, and Lucia could hear if Carter laughed. *Id.* at 50.

Finally, Epifanio confirmed that he saw Carter’s gun at Perla’s house in the whirlpool, and he saw it again when he took it out of the device and threw it in the river. *Id.* at 84–85. And Epifanio confirmed that he helped Carter flee by driving him to Wendover, *id.* at 55–56, helped Carter dispose of the murder weapon, *id.* at 56, told Perla on the car ride home from Wendover that “Carter said he had killed a woman,” *id.* at 42, and his conversation with Perla pre-dated any payments he received from police, *id.* at 40,74–75.

Compare Epifanio’s evidentiary hearing deposition testimony, described above, with his testimony at trial, and the picture he painted at trial is almost entirely undisturbed.

And Epifanio told the same basic story to Perla. R7944–57,7963–74. The structure and narrative of Epifanio’s account to Perla agrees entirely with

Carter's confession, with Epifanio's recorded statements to Pierpont, and with Epifanio's trial testimony.

And to whatever extent Perla's recitation of Epifanio's statements to her differ from Epifanio's statements to police and his testimony, those differences amount to precisely the sorts of minutiae that one expects to filter out of a third-hand retelling of a story. Like a game of telephone, details easily go unremembered or unreported, especially when the teller is under stress as Perla was when she was speaking to Mack. It would have been remarkable and perhaps even suspicious if Perla's statement to Mack included every detail that Epifanio's statement to Pierpont included. But what is most remarkable about Perla's statement is that not one material detail of the crime differs in her telling from Carter's or Epifanio's.

Lucia corroborated further, also giving a pre-payment description of Carter's confession to Mack. While her lack of English comprehension limited what she understood about Carter's confession, she reported seeing Carter demonstrating putting his hands behind his back, consistent with Epifanio's statements and testimony that Carter demonstrated tying Eva's hands behind her back, and that he laughed while he demonstrated it. Pet.Ex.10. And she understood that Carter was demonstrating what he did to Eva. *Id.* This interview occurred both before she received any payments and likely before

she could debrief with Epifanio about what he told Pierpont – Epifanio was still in custody when Mack interviewed Lucia. *Compare* Pet.Ex.10 (Mack interviewed Lucia on Apr. 12, 1985), *with* Pet.Ex.16 (showing Epifanio was still in police custody).

And this case was not without at least some corroborating circumstantial evidence. Carter had access to a gun—a .38 caliber Charter Arms—that could have fired the bullet that ended Eva’s life. That bullet was one of two possible brands; police seized bullets from Carter’s home that were one of those brands. Carter had been to the Olesen home before. Carter’s wife said that some of his clothing appeared to be blood stained. Carter told his wife a story about the murder that, while it purported to implicate two unidentified people, still put him at the murder scene. And Carter was near the scene of the murder that night, police first contacted Carter about a car break-in nearby. *See Carter II*, 888 P.2d at 634.

- ii. **Carter’s confession, materially identical to Epifanio’s telling, would have obviated any hesitation the jury might have had about believing the Tovars.**

Aside from Carter’s confession standing on its own, together with the minimal hit to Epifanio’s credibility had any payments, threats, or coaching become known, Epifanio’s credibility on his incriminating testimony became unquestionable when Carter himself confirmed what Epifanio told police.

Carter confessed to materially the same details Epifanio gave at trial, and he confessed that he detailed the murder for Epifanio and Lucia. Any doubts the jury might have had about the Tovars' credibility would have been put to rest by Carter's own confessions.

Not only did Carter's confession to Pierpont match the crime scene, but it also included details unknown and unknowable from the physical evidence left at the crime scene. CIR1185-88; CIR.Ex.26 (Carter's signed confession).

Epifanio's version of Carter's confession to him—told to Perla then retold to police and to the jury at trial—and Carter's confession to Pierpont are in broad general agreement. Both narratives included Carter planning to break into a car and to steal, Carter knocking on Eva's door, Carter entering the house, Carter pulling a gun on Eva, Eva trying to defend herself with a knife, Carter stabbing Eva about 10 times in the back, Carter shooting Eva in the head, then Carter going home and cleaning up before returning to the Tovars' home. *See* CIR1129-48.

But certain details of Carter's confession to Pierpont stand out as particularly corroborative of Epifanio's statements to Perla and Pierpont. Both Epifanio and Carter stated emphatically that Carter did not rape Eva even though he pulled her pants down. Apparently, television or print news had reported Eva was sexually assaulted. If Epifanio had simply relied on

news coverage to fabricate that Carter confessed to him, he would not have known that detail. And both Epifanio and Carter further related that the reason Carter did not rape Eva was that she was menstruating. *See* CIR1140-41,1216.

Even more importantly, Carter and Epifanio both related the detail that Carter tried to muffle the gunshot to the head by firing through a pillow, but that the pillow caught in the hammer of the gun causing it to not fire. The latter detail could not have been known to anyone but the killer and those the killer told. Here, Carter first told it to Epifanio, who told it to Perla before he spoke to Pierpont, told it to Pierpont, and ultimately told it to the jury. That Epifanio knew this single detail, without Pierpont feeding it to him or even having any reason to know about it, fully buttresses the credibility of his testimony that Carter confessed the murder and its details to the Tovars.

On top of agreeing with Carter's version of events, Epifanio's testimony also tracked the physical evidence: (1) Eva was stabbed ten times; (2) the knife found at the scene could have caused the stab wound; (3) Eva was shot in the back of the head; and (4) forensic testing showed unburned gun powder particles on a pillow found at the scene. In his pre-support statements to police and Perla, Epifanio reported other details consistent with the physical evidence: (1) Eva's pants were pulled down; (2) she was

menstruating; and (3) Carter left no fingerprints, including on the knife. Epifanio could not have known the killer left no prints on the knife unless the killer, Carter, told him so.

- iii. The district court failed to explain the whole record showing compelling agreement between Epifanio's pre-interview statements to Perla, Epifanio's police statements, Epifanio's trial testimony, Lucia's pre-payment statements, Carter's confession to Pierpont, and the crime scene.**

The district court failed to explain the whole record showing compelling agreement between Epifanio's pre-interview statements to Perla, Epifanio's police statements, Epifanio's trial testimony, Lucia's pre-payment statements, Carter's confession to Pierpont, and the crime scene. All the court suggests is that Epifanio's consistent pre-motive statements would not have helped the State because his testimony became more favorable to Carter over time. R8937-38. The court cited as examples Epifanio telling police "the location of the gun and Carter's directive to dispose of it in the river" just days before trial, Epifanio testifying that he "only received a \$14 witness fee for his testimony," and Epifanio's testimony at trial that "Carter had expressed a desire to 'rape, break, and drive' before the murder." R8937. The court reasoned that "Carter could have used the undisclosed financial benefits, threats, and coached false testimony to show that the Tovars'

testimony was a work in progress, evolving over time to strengthen the State's case." R8937 (citing *Tillman*, 2005 UT 56, ¶87). But even if the jury found that testimony about the gun, the \$14 witness fee, and "rape, break and drive" was unbelievable, it had no bearing on Epifanio's compelling testimony about the murder, which remained consistent between Epifanio's pre-interview statements to Perla, Epifanio's police statements, and Epifanio's trial testimony, which he stands by to this day.

In any event, the jury already knew at least some of this information. The jury knew that Epifanio had originally lied when he told police he didn't know what happened to the gun. CIR1147-48;1162-63. And Carter elicited from Epifanio at the 1985 trial that the State dismissed the obstruction charges against Epifanio in exchange for his testimony. CIR1167-70. Likewise, Carter elicited testimony that the Tovars were in the country illegally. *Id.* at 1164. And his counsel argued that the jury should not believe Epifanio because he had been "locked up in connection with this case by [Pierpont]," was "not a citizen" and "perhaps" "desperate about staying in this country, maybe desperate in terms of his family." *Id.* at 1361-63,1373-76.

As to the potential removal of their child, if that were presented only as a collateral consequence to prosecution, then it was part of the consideration for Epifanio's testimony about which the jury already knew:

the State agreed not to prosecute Epifanio for obstruction. So there is no reasonable likelihood of a more favorable result at trial if the jury were presented with yet more evidence that the police threatened the Tovars because they were already presented with such evidence and found Carter guilty anyway.

What's more, the jury did not need to be expressly told that the Tovars felt threatened by police. It would likely have inferred that from the information it already had. Having no legal status, the Tovars had an inherent fear of deportation and would naturally perceive any police interactions, however benign, as threatening. Epifanio's own confessed crimes and the Tovars' legal status would naturally lead them to perceive police interactions as threatening even without police making threats. The jury knew the Tovars were in the country illegally and that Epifanio was implicated as an accomplice after the fact to Carter's murder. So it is reasonable to assume that had the jury been presented with direct evidence that the police threatened to arrest or deport the Tovars, it would not have materially detracted from the evidentiary picture on Carter's guilt.

And there is no reasonable likelihood the jury would have acquitted Carter if they knew that the police or prosecutor coached Epifanio to lie about any payments he received. Impeaching Epifanio with payment evidence

would not have affected the jury's decision to convict Carter because of Carter's unchallengeable confession, Epifanio's pre-payment incrimination of Carter to Perla, and the double-edged nature of impeaching Epifanio with payment evidence.

Had Epifanio's testimony about Carter's confession to him come under any cloud of suspicion because of threats or coaching, the prosecutor would likely have sought to rehabilitate him. Calling Perla to testify would have shown that Epifanio recounted Carter's confession before ever interacting with police and receiving any threats or being told to testify falsely or embellish. Perla's interview with Mack was, after all, the best available evidence of what Epifanio said about the murder before he met with police.

Stated another way, if the evidence of coaching cast any cloud on Epifanio's credibility, it at most may have led the jury to conclude that Epifanio lied about the benefits and "rape, break and drive" and nothing else. All his material testimony was corroborated, including by Carter himself.

The court said that "Lucia's testimony also evolved." R8937. The court suggested that Lucia's preliminary hearing testimony included "little detail" yet her trial testimony "painted a far more sinister picture." R8937-38. The court pointed to Lucia's preliminary hearing testimony "that Carter lay on the floor and was 'giving someone's hand on the back, and he was just doing

something like moving his hand back and forth.’” *Id.* (citing Tr.Prelim.Hr’g at 54)). Lucia demonstrated, “explaining that ‘[Carter] got up where he was sitting and he lay down on the floor.... He bent a little bit and he put his hands on the back and he start moving his hand back and forth. He opened his legs and then he just bent more over.’” *Id.*

But this tracks Lucia’s trial testimony that Carter showed how he was “holding up his hand with the fist clenched and *moving it forward and backward.*” CIR1258 (emphasis added). And the court disregarded that Lucia’s trial testimony arguably became less damaging because at the preliminary hearing, Lucia testified that Carter demonstrated shooting someone, Tr.Prelim.Hr’g at 55, but she did not say that at trial.

The court also suggested that Lucia’s testimony at trial “painted a far more sinister picture,” R8937–38, when “she testified that Carter ‘laid himself to the floor showing us exactly how he had forced this individual to lay down, and then he put his hands behind his back to illustrate how he had tied her hands behind her back.’” R8938 (citing CIR1258). “According to Lucia, Carter was ‘laughing and giggling’ during the demonstration, which he gave not once but twice.” *Id.*

But the court ignores Lucia’s pre-financial-support statements to Mack that Carter demonstrated binding someone with “his hands behind his back

with the back of the wrists touching together,” which tracked her trial testimony. Lucia also told Mack that Carter was laughing. Pet.Ex.10. They also corroborated her husband’s pre-financial-support accounts to Perla and then to police of Carter detailing the murder and Carter’s own confession that he disclosed to the Tovars what he had done. Finally, Lucia has never recanted her testimony that Carter demonstrated binding and stabbing someone, was laughing while he demonstrated, and that he told her husband to watch the news on the night of the murder. Indeed, at the evidentiary hearing, Lucia confirmed that she saw Carter laughing and demonstrating something on the ground the night of the murder. R7625,7629–30.

And Epifanio confirmed in his deposition that it was true when he testified at the preliminary hearing that Carter lay on the living room floor and demonstrated what he had done to Eva. Pet.Ex.1 at 87. And Epifanio admitted that Lucia was in the same room when Carter was telling Epifanio about murdering Eva and demonstrating it. *Id.* at 50. And Epifanio confirmed that Carter was laughing. Pet.Ex.1 at 87–88. Carter has never recanted either his confession to police or his confession to the Tovars. He has never testified to dispute what Epifanio and Lucia said, or even what he told Pierpont.

The court suggested that because “Epifanio’s coached false testimony was not disclosed, the jury was deprived of the opportunity to evaluate the

credibility of Lieutenant Pierpont,” which “would certainly have called into question Lieutenant Pierpont’s testimony about Carter’s unrecorded oral confession, and the somewhat inconsistent written confession Lieutenant Pierpont dictated in his own words for Carter to sign.” R8935.

Here, the court appears to be questioning the veracity and reliability of Carter’s confession and how it was dictated. But the court itself ruled that “attacking the validity, veracity, or reliability of Carter’s confession is irrelevant” in this postconviction proceeding. R3331. It reached that conclusion after surveying this Court’s rulings, which twice held that Carter’s confession was constitutional. *Carter I*, 776 P.2d at 890–91 (Utah 1989); *Carter II*, 888 P.2d at 641 (Utah 1995). This Court gave no indication at all that the dictation method here undermined the confession’s reliability. Indeed, in Carter’s last appeal, this Court held that “the veracity of Carter’s confession is not at issue in this case” and “Carter is now procedurally barred from challenging his confession.” *Carter VI*, 2019 UT 12, ¶147. And while this Court noted that the Tovar’s testimony corroborated Carter’s confession, its holding that the confession was admissible did not turn on that notation. *Carter II*, 888 P.2d at 645 n.18.

The district court suggested that in “context the failure to disclose that Epifanio lied about material facts under oath during trial and that he did so

at the direction of the police was prejudicial to Carter's defense" because "no physical evidence tied Carter to the crime scene," the "State's case rested on the confession, and the Tovars' corroborating testimony," and "Carter's theory was that Epifanio was lying and that Carter's confession was coerced by unscrupulous police officers." R8939. But this would contradict Carter's own admission that he confessed to Epifanio. Carter's counsel could have made the argument, but it would have been entirely incredible and had no reasonable likelihood of affecting the jury's judgment.

But the question is whether it would be reasonable to conclude that unmasking any coaching would give the jury *reason* to acquit given the entire record. And on this record, no reasonable jury would have disregarded the unchallengeable force of Carter's confession after hearing that Epifanio lied about payments he received or about Carter saying "rape, break and drive."

Indeed, for the same reasons the jury would not have questioned Epifanio's testimony about Carter's confession to him about murdering Eva, it would not have questioned Pierpont's testimony about Carter's confession to him either. Pierpont's testimony tracked Carter's signed confession, Epifanio's testimony about what Carter told him about murdering Eva, and Perla's statements to police about what Epifanio told her about Carter telling

him about murdering Eva, which happened before Pierpont could have coached Epifanio.

Finally, even if Pierpont told Epifanio to say, “rape, break and drive,” the jury heard Watson try to correct Epifanio’s testimony on the stand, and Watson never used or repeated the phrase “rape, break and drive” in the State’s case. After Epifanio testified that before Carter left, he said, “he was going to rape, break and drive,” Watson was careful to correct the record and make sure Epifanio told the jury only what Carter told him. Indeed, at trial, Watson followed up immediately by asking whether Carter told him that. CIR1129. Epifanio said, yes. *Id.* Watson asked again for clarification, “[w]hat’s your best recollection, Mr. Tovar, of what the defendant told you he was going to do? Tell me what you remember him saying?” *Id.* at 1129–30. Epifanio corrected himself, responding, “[t]hat he was going to [g]o break in a house” because he “needed money.” *Id.* at 1130. So the jury would have heard Epifanio’s clarification about what Carter actually told him, which was that he planned to break into a house and steal.

Watson never repeated the phrase “rape, break and drive” in his closing argument or in any other part of the State’s case in the guilt phase. So the jury was even less likely to consider that phrase when it convicted Carter.

The district court was not persuaded that Watson corrected Epifanio's "rape, break and drive" testimony because he did not take "affirmative steps to remove any lingering doubts about whether the testimony was false." R8939-39 (citing *State v. Gordon*, 886 P.2d 112, 116-17 (Utah Ct. App. 1994); *United States v. Ramos-Carillo*, 511 F. App'x. 739, 741 (10th Cir. 2013); *United States v. Islam*, 786 F. App'x. 343, 344-45 (9th Cir. 2018)). But all the court's cases in support are about a prosecutor's duty to correct known false testimony under *Napue*. Under *Brady*, all that matters is that there is no reasonable likelihood of a more favorable result at trial if the jury were presented with evidence that the police told Epifanio to say, "rape, break and drive." That Watson tried to correct Epifanio's testimony and never referenced "rape, break and drive" again is enough for this Court to have confidence in Carter's conviction given Carter's confession and the unrelenting consistency between the Tovars' pre-police statements, trial testimony, evidentiary hearing testimony, and physical evidence.

For these reasons, Carter did not prove guilt-phase prejudice on his *Brady* claims.

C. Given the entire record, Carter did not prove a reasonable likelihood that not correcting false testimony could have affected the judgment of the jury.

To prove prejudice under *Napue*, Carter had to prove that not correcting false testimony created any reasonable likelihood that the error could have affected the judgment of the jury. Utah Code Ann. § 78B-9-104(2)(b); *Napue*, 360 U.S. at 271. Carter did not do so, and the district court erred when it ruled that Carter did.

Epifanio's testimony, dramatic though it was, formed only a small part of the prosecution's case and little turned on it. The jury could have decided to disbelieve Epifanio entirely as a self-interested opportunist or paid government shill and the jury still would have convicted Carter. And there was little likelihood that the jury would have disbelieved Epifanio entirely. Carter corroborated Epifanio's testimony that he told Epifanio what he had done, and Carter's account tracked Epifanio's account in all material respects. Epifanio's account to Perla of what Carter told him—before any police contact—tracked both. The district court was wrong to find that Carter met his burden of proof because it based its ruling on its erroneous burden-shifting *Brady*-prejudice analysis. *See supra* section I.A.2. In any event, Carter did not meet his burden of proof.

The Supreme Court has seldom had occasion to elaborate the prejudice standard applicable to due process claims of this sort. But where it has done so, it has framed the question as one of the relative importance of the challenged witness to the overall question of guilt. *Napue*, 360 U.S. at 269 (“The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.”).

Carter’s life and liberty did not depend on Epifanio’s credibility since Carter’s confession to Pierpont stood independent of Epifanio and fully proved his guilt beyond a reasonable doubt. The court offered no reason why any jury would disbelieve Carter when he said he committed capital murder, or when he said he had told Epifanio about what he had done.

And if any doubt about Carter’s guilt remained—despite his confession—and his guilt depended to any degree on Epifanio’s credibility, impeaching Epifanio about any false testimony would not have affected the judgment of the jury. This is because the taint to Epifanio’s credibility is not nearly so severe as the court suggests. Epifanio’s account to Perla of Carter’s detailed description of killing Eva pre-dated any offer of financial assistance, threats, or coaching, leaving that account untainted by any State-sponsored

incentives to lie or embellish. Even now, after all alleged payments have long-since evaporated and Epifanio has no conceivable reason to testify favorably for the prosecution, Epifanio maintains the truthfulness of his statements to Pierpont implicating Carter. Carter himself vouched for Epifanio's pretrial statements and has never testified otherwise.

1. The district court's hasty conclusion that Carter proved *Napue* prejudice was wrong—there was not any reasonable likelihood that a lie about whether the Tovars got money and support from the State could have affected the jury's judgment.

Accepting as true the district court's findings that the prosecutor knowingly failed to correct lies about payments to Epifanio, its prejudice analysis had to include everything we now know thanks to the evidentiary hearing. That includes knowing that Epifanio continues to insist, even with no State-sponsored motivation to do so, that Carter confessed to killing Eva and all the details about it. The court's prejudice analysis conspicuously omits almost all the relevant facts that Epifanio recently confirmed. Indeed, it merely states in conclusory fashion that "[f]or the reasons stated above" in its *Brady* analysis, "the Court concludes that the State's failure to correct Epifanio's coached false testimony could have resulted in a different outcome both in the guilt and sentencing phase." R8945. The court believed Epifanio about payments he received and that he lied at trial about them. But the court

gave no justification for believing Epifanio's current narrative about police interactions but not his unchanged insistence that Carter confessed to him.

Thus, the district court's conclusory ruling that Carter proved *Napue* prejudice was wrong—there was not “any reasonable likelihood” that a lie about whether the Tovars got “money and support” from the State “could have affected” the jury's judgment. *Napue*, 360 U.S. at 271; *Walker v. State*, 624 P.2d 687, 690 (Utah 1981). The contrast between the facts here and those that justified relief in *Napue* and *Walker* show why.

In *Napue*, the State's “principal witness” was convicted of and sentenced to 199 years for the same murder as Napue. That witness's testimony “was extremely important” in securing Napue's conviction “because the passage of time and the dim light in the cocktail lounge” where the murder occurred “made eyewitness identification very difficult and uncertain, and because some pertinent witnesses had left the state.” *Napue*, 360 U.S. at 265–66. The principal witness was the only one who could definitively identify Napue as the killer. And unlike Carter, Napue had not confessed.

When Napue's counsel asked the witness, “Did anybody give you a reward or promise you a reward *for testifying?*” the witness responded that no one had promised him anything. *Id.* at 267 n.2 (emphasis added). The

prosecutor elicited the same response on redirect examination. *Id.* The prosecutor later disclosed to the trial court that the witness had in fact hesitated to cooperate any further unless the prosecutor recommended a reduction in his sentence. The prosecutor made the recommendation on the witness's behalf. *Id.* at 266–67.

The Supreme Court held that the jury's "estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors *as the possible interest of the witness in testifying falsely* that a defendant's life or liberty may depend." *Id.* at 269 (emphasis added).

In *Walker*, the false testimony went to the core of the State's evidence supporting her conviction for possession with intent to distribute a controlled substance. And unlike Carter, Walker did not confess. The issue was who owned the heroin seized from Walker's office. The prosecutor there failed to correct an officer's testimony denying that a man kept his clothes and other items in Walker's locked office, which the prosecutor later argued was under Walker's exclusive control. *Walker*, 624 P.2d at 688–89 & nn.2–3. Before the prosecutor made that argument, another officer had informed him that he had accompanied a man into the office to retrieve clothing he kept there. *Id.* at 690.

This Court granted Walker relief on this evidence because the false testimony was critical to the contested issue on which the State founded its case and Walker founded her defense: who had access to and control of the office. *Id.* at 691. The Court determined that the uncorrected testimony and prosecutor's closing argument relying on it "created the false impression that no men's clothes were found in the room at the time of the search." *Id.* The undisclosed testimony that a man's clothes were found in the office "would have added direct support" to Walker's defense and to her testimony that (1) the man—who had four heroin balloons on him—had use and control of the office where police found the fifty-six more heroin balloons on which the criminal charges were founded, and (2) Walker made no post-arrest statement admitting exclusive control of the office. *Id.* at 691 n.12.

Carter's case bears none of the attributes that justified relief in *Napue* and *Walker*. Unlike the witness who lied in *Napue*, Epifanio did not give the most critical evidence against Carter. The case against Carter was fully fledged based on Carter's confession and the corroborating scene of the crime. Epifanio's testimony merely added corroboration and color to the confession that already supported the prosecution's burden of proof.

And unlike *Walker*, the prosecution's case here did not depend on circumstantial evidence to eliminate one potential suspect in favor of the

defendant. The jury heard that Carter himself detailed the murder to police. Carter's confession provided the principal and direct evidence that he killed Eva. He never contradicted (1) the substance of that evidence or (2) that he detailed the murder for the Tovars. So even if the defense could have pointed out that Epifanio lied about only receiving \$14 from the State, Carter confirmed that Epifanio did not lie about Carter admitting the murder to him and Lucia. And Epifanio, with no apparent ongoing incentive to do so, still credibly maintains what Carter insisted, that Carter detailed the crime for him exactly as Epifanio related it to Pierpont. *See* Pet.Ex.1.

What's more, any lie about payments did not go to the heart of the State's case, as the false testimony in *Walker* did. At best, Epifanio's disclosure of financial assistance beyond the witness fee would have been entirely tangential to guilt. Again, the details Epifanio testified Carter told him are materially the same as the details the jury heard that Carter reported to police—including Carter's uncontradicted admission that he confessed to Epifanio—and matched the crime scene.

And the jury would have had even less concern about Epifanio's credibility and its implications for Carter's guilt since the undisputed evidence shows that police never tied any payments or threats of deportation

or losing his son to any instructions to lie on the stand, Pet.Ex.1 at 58–60; the prosecutor only ever told Epifanio to tell the truth on the stand, *id.* at 60–61.

Nor could Carter have impeached Epifanio about payments without the prosecution explaining what they were for, which would not have helped Carter. Epifanio told Pierpont that he was thinking about leaving the state. R8060;St.Ex.F.78. Paying the Tovars to keep them around for trial was entirely benign.

Explaining the other purpose of payments – to protect the Tovars from Carter – would have harmed Carter. Epifanio confirmed that he told Pierpont he was afraid of Carter, who might retaliate against Epifanio and his family if Carter knew that Epifanio cooperated with police. Pet.Ex.1 at 49,62,79,95. When the jury would later have to decide whether Carter deserved to die, nothing could have been a worse for Carter than Epifanio explaining his fear of Carter. *See Wong v. Belmontes*, 558 U.S. 15, 22 (2009) (admitting mitigation evidence “would have triggered admission of the powerful [harmful character] evidence in rebuttal. This evidence would have made a difference, but in the wrong direction.”).

Also, unlike the witness in *Napue*, Epifanio did not receive a “reward for testifying” about the thing he claims he lied about – getting “money and support” from the State. Rather, he received financial assistance so that he

and his wife could safely remain in Utah to testify. Napue's witness "expressed" his "reluctance" to testify against Napue without a "definite assurance" of a favorable sentence reduction recommendation, which the witness got, then lied and said he did not get. *Napue*, at 266 n.1. The district court, by contrast, never suggests that either Tovar "expressed" "reluctance" to testify unless the State paid their rent and utilities and gave them food so they "could eat." Indeed, the court pointed out that Carter concedes that there was no quid pro quo to testify falsely about financial benefits and "rape, break, and drive." R8834.

Both Tovars repeatedly expressed fear of Carter and Carter's family and what they could do to the Tovars upon discovering that the Tovars were cooperating with police. Relocating a witness who reports someone confessing in detail to a murder to protect that witness from the murderer is not a "reward for testifying." *See, e.g., Vieira v. Chappell*, No. 1:05-CV-01492-AWI, 2015 WL 641433, at *34 (E.D. Cal. Feb. 5, 2015) ("There is nothing remarkable about providing a witness with assistance with housing and meals while the witness is assisting the prosecution."). And unlike a quid pro quo for testimony, which the district court and Carter concedes did not happen here, it does not encourage falsifying evidence against the

confessor — an incentive that would be necessary for the jury to have a reason to disbelieve Epifanio's incriminating testimony.

In sum, the court was wrong to find that Carter proved "any reasonable likelihood" that any lie about payments from Epifanio "could have resulted in a different outcome." R8945. No reasonable jury could acquit Carter, who voluntarily confessed to capital murder and whose confession matched the physical crime scene and the testimony of supporting witnesses who also heard another confession from Carter. Carter's guilt or innocence did not turn on Epifanio's credibility. And even if it did, any lies the prosecution knowingly left uncorrected did not so fully undermine Epifanio's credibility that his incriminating statements would have been disbelieved. He has never recanted his trial testimony about Carter's confession, even many decades after any State-sponsored incentive to lie has evaporated. That testimony tracks Epifanio's and Lucia's pre-payment statements, Carter's confession, and the crime scene.

And any argument that Epifanio lied to incriminate Carter, aside from contradicting Epifanio's recent deposition testimony and Carter's own corroboration, fails to explain how Epifanio knew details about the murder like the number of times Carter stabbed Eva or, more astonishingly, details

only the killer could have known, such as how the pillow caught in the gun's hammer. Carter himself confirmed the latter.

2. The district court's new rule imputing police knowledge of false witness testimony to the prosecutor is wrong and incompatible with its conclusion that Watson did not do enough to correct Epifanio's "rape, break and drive" testimony he did not know was false.

The district court correctly found that Carter did not prove that Watson knew that the "rape, break and drive" testimony was false. R8927. The analysis should have ended there. If Carter failed to prove that the prosecutor knew the testimony was false, then he failed to prove a *Napue* violation on this issue. See *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 831 (10th Cir. 1995) (concluding that a *Napue* violation was avoided because, even though state investigative employee was aware of false testimony, prosecution did not have actual knowledge of false testimony). The court's decision that a *Napue* violation occurred is erroneous for this reason alone.

Furthermore, even if Pierpont told Epifanio to say, "rape, break and drive," the jury heard Watson try to correct Epifanio's testimony based on what he knew—that Epifanio had not said "rape, break and drive" in his recorded statement to Pierpont. And Watson never repeated the "rape, break and drive" testimony in the State's case at the guilt phase. If the prosecutor

did not know that the “rape, break and drive” testimony was false, then Watson could only know to do what he did and needed to do nothing more.

- i. **The district court made new law when it determined that police knowledge that a witness testified falsely should be imputed to the prosecutor under *Napue*.**

The district court made new law when it determined that under *Napue*, a police investigator’s knowledge that he coached a witness to testify falsely should be imputed to the prosecutor like in *Brady* cases. R8945 n.12. The court reasoned that there “is no reason why this same principle should not apply when a police investigator coaches a prosecution witness to testify falsely.” *Id.* But that is not the current state of the law in Utah. The court cited no case law supporting this rule. And postconviction is not the appropriate venue for making and applying new law. A *Napue* violation occurs when a prosecutor knowingly fails to correct false testimony. How can a prosecutor be required to correct testimony that he does not know is false? The prosecutor’s culpable, knowing exploitation of false testimony is the whole reason, after all, why *Napue* violations require a lower prejudice showing than *Brady* violations. Imputation of police knowledge directly contradicts *Napue*’s theoretical foundations.

Indeed, the court’s rule contradicts at least three federal circuits that have considered the issue, including the Tenth Circuit. *See, e.g., Smith v.*

Massey, 235 F.3d 1259, 1272 (10th Cir. 2000) (“[T]his court and the Fifth Circuit have refused to impute knowledge of a law enforcement officer to the prosecution where there has been an alleged *Napue* violation.” (citing *Smith*, 50 F.3d at 831; *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990)), *abrogated on other grounds by Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001)). See also *Sargent v. Sec’y, Fla. Dep’t. of Corr.*, 480 F. App’x. 523, 529–30 (11th Cir. 2012) (state court’s decision that state toxicologist’s knowledge that a witness testified falsely was not imputed to the prosecutor under *Napue* to prove a *Giglio* claim was not unreasonable).¹⁰

ii. The district court’s new law is incompatible with its ruling that Watson did not do enough to correct Epifanio’s “rape, break and drive” testimony he did not know was false.

What’s more, the district court’s cases supporting its requirement that Watson take “affirmative steps” to correct the false testimony are all cases in which the prosecutor *knew* the testimony was false. So they knew that they

¹⁰ The Supreme Court has not addressed the issue. The Fourth and Second Circuits only impute “knowingly false or misleading testimony *by a law enforcement officer*...to the prosecution” for purposes of determining whether there has been a *Napue* violation. *Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998) (emphasis added); *Wedra v. Thomas*, 671 F.2d 713, 717 n.1 (2d Cir. 1982) (same). Only the Ninth Circuit imputes a law enforcement officer’s knowledge that a witness testified falsely to the prosecution under *Napue*. See *Jackson v. Brown*, 513 F.3d 1057, 1075 (9th Cir. 2008). But even the Ninth Circuit recognizes that this is not clearly established federal law. See *Reis-Campos v. Biter*, 832 F.3d 968, 977 (9th Cir. 2016).

needed to do something more to correct it. But witnesses say surprising things on the stand all the time. It should be enough that a prosecutor who did not know that testimony was false got the witness to correct his testimony on the stand in front of the jury and never used the false testimony again.

The burden to correct false testimony should be high for prosecutors that know testimony is false. But it cannot be so high for prosecutors who don't have the same knowledge. Otherwise, no prosecutor under the same circumstances could meet it. Here, Watson urged Epifanio to say what Carter actually told him he planned to do. And Epifanio did. Moreover, Watson never mentioned the "rape, break and drive" testimony to the jury again. That must be enough.

Given Carter's confession and Epifanio's other testimony about what Carter told him about murdering Eva consistent with that confession, which he stands by to this day, this Court should have confidence in Carter's conviction. Thus, Carter did not prove guilt-phase prejudice on his *Napue* claim.

D. None of the evidence undermines confidence in Carter's death sentence under *Brady* or *Napue*.

The *Brady* and *Napue* materiality analysis at sentencing is the same because to succeed under either *Napue* or *Brady*, Carter had to prove that

unmasking any lies or suppressed evidence could have reasonably “undermine[d] confidence” in his death sentence. *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678); see also *Jackson*, 513 F.3d at 1076 (explaining the “analytical challenge” of analyzing *Brady* and *Napue* materiality standards “collectively,” but at “both stages, we must ask whether the defendant ‘received...a trial resulting in a verdict worthy of confidence.’” (quoting *Kyles*, 514 U.S. at 434)).

On sentencing-phase prejudice, the court compared this case to that in *Tillman*. R8940–42. Yet *Tillman* is distinguishable from this case, and the district court did not analyze the differences between the two. Indeed, it merely summarized this Court’s holding in *Tillman*, and then posited its theory for how “at least one juror may have been persuaded that Carter was less morally culpable and did not deserve to die for his crime,” had “‘rape, break, and drive’ been excluded from the penalty phase.” R8942–43.

But *Tillman* did not confess. Given Carter’s unchallengeable confession and the many aggravating factors arising from evidence unrelated to the Tovars’ testimony, there is no reasonable likelihood that false testimony by Epifanio about a non-crucial issue could have affected the jury’s judgment at sentencing or that had any allegedly suppressed, favorable evidence been disclosed, Carter would not have been sentenced to death. Carter’s

confession to Pierpont, his statement to Epifanio that he was going to rape her, but she was “on the rag,” and the physical evidence corroborated Carter’s intent to rape Eva. Thus, based on everything we now know, Carter did not prove materiality of his *Brady* and *Napue* claim for his death sentence.

1. Given Carter’s confession and the many aggravating factors, Carter cannot prove prejudice on any claim.

The district court suggests that “the 1992 resentencing prosecutor relied heavily upon” Epifanio’s “rape, break and drive” testimony “in seeking a death sentence.” R8942. The court reasoned that “[e]vidence that Carter, shortly before the murder, expressed a wanton desire to rape someone, break someone or something, and flee may well have persuaded the jury that Carter was so culpable and dangerous as to require imposition of the death penalty.” R8943.

But there is no allegation that the 1992 sentencing prosecutor violated *Napue*. And there is no allegation, testimony, or evidence that the 1992 sentencing prosecutor knew that Epifanio’s “rape, break and drive” testimony at the guilt phase was false. The claim is that Watson, the prosecutor at the guilt phase, violated *Napue* by not correcting the “rape, break and drive” testimony. R8654. As explained above, the district court erred when it ruled that Carter proved that the State violated *Napue* when Watson did not correct Epifanio’s “rape, break and drive” testimony even

though Carter did not prove that Watson knew that the testimony was false. *See supra* section I.C.2. Thus, there could not have been a *Napue* violation at sentencing either.

In addition, the sentencing jury was tasked with returning a verdict of death “only if, after considering the aggravating and mitigating circumstances, not in terms of the relative numbers of aggravating and mitigating factors, but in terms of their respective substantiality and persuasiveness, you are persuaded beyond a reasonable doubt that the totality of aggravating circumstances significantly outweighs the totality of mitigating circumstances.” CIIR1691. There were so many aggravating circumstances for the jury to consider that Epifanio’s testimony that Carter told him he was going to “rape, break and drive” was a drop in the bucket. Even if the jury were to discount this testimony or reject it entirely as incredible, there is no reasonable likelihood or probability that they would not have sentenced Carter to death.

First, the jury was instructed to consider as aggravating circumstances “the nature and circumstances of the crime and any other facts in aggravation produced that relate to the nature and circumstances of the crime or the character of the defendant.” CIIR1687. The jury considered that this was a

night-time home invasion torture murder with a sexual component. Carter's confession alone established that.

Carter confessed, not just to Epifanio but also the police, that he entered Eva's house with a gun, demanded money, tied her hands behind her back, stabbed her ten times, left her "moaning" while he searched for valuables, before returning and shooting her in the head. CIR.Ex.26. Carter told Pierpont that when he left Eva's house "he felt that she was still alive, that she was gurgling when he left." CIIR1133. Carter also told Pierpont that "he thought about raping her but that she was on her period." CIIR1132. This is corroborated by the physical evidence, which showed Eva's murdered body with her hands tied behind her back, her pants and pantyhose pulled down to her ankles, and a sanitary napkin at her feet. And Carter confessed to going back to the Tovars' house and telling them what he did, and Epifanio and Lucia testified that Carter predicted they would see it on the news. And the jury saw photographs of the scene of the murder, showing Eva's body on the ground, tied up, pants and panty hose pulled down around her ankles, and sanitary napkin removed and left at her feet. *See* CIIR1032-34. And Epifanio told Pierpont that he later asked Carter if he had raped Eva. Carter told him that he thought about it, but she was "on the rag." St.Ex.F.29-30,37-38,49-50.

Second, the jury was instructed to consider as aggravating circumstances that Carter “committed this crime while engaged in the commission of or an attempt to commit aggravated burglary.” CIIR1687. That was undisputed.

Finally, the jury was instructed to consider as aggravating circumstances whether the “homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death.” *Id.* Even without the Tovars’ testimony, there was ample evidence to support that Carter murdered Eva in an especially heinous, atrocious, cruel, and exceptionally depraved manner, including physical torture, physical abuse, and serious bodily injury before she died. *See* CIR1186, CIIR1133.

The medical examiner testified at the resentencing hearing about the gruesome and violent nature of the knife wounds. For example, Eva’s abdomen knife wound “went completely through” “a “two-inch thick bone, vertebra, vertebral body, which is a quite heavy bone.” CIIR1008–09. And the knife wounds went through Eva’s heart, lungs, and fractured three ribs. The depth of the stab wounds and the length of the knife—over eight inches

long—would have required Carter to bury the knife into Eva’s body. CIIR1012.

And the medical examiner testified at the resentencing hearing that the autopsy evidenced that Eva was still alive after Carter stabbed her, but before he shot her while he was searching around the house for other valuables to steal—Eva’s “heart was still beating” after she was stabbed and before she was shot. CIIR1015–17. Indeed, the time Eva could have been alive between when Carter stabbed her ten times and when Carter shot her in the head could have been up to five to ten minutes. CIIR1026.

Thus, even if the jury were to discount or reject as incredible Epifanio’s testimony that Carter told him that he was going to “rape, break and drive” the night of the murder, the objective physical evidence resulting from Carter’s actions still revealed the character of a person who deserves to die. Indeed, the totality of the evidence and aggravating circumstances were more horrifying and morally relevant to the jury than the Tovars’ testimony suggesting a premeditated but ultimately not-completed rape. And whether Carter’s intent to rape Eva was formed when he left the Tovars’ home or only after he tied her up makes little difference. The material point is that he intended to rape, and that Eva understood that was his intent when he pulled down her pants and removed her sanitary napkin while she was tied up and

helpless. Indeed, Carter told Pierpont that Eva begged Carter not to rape her after Carter “told her to take her pants down” at knifepoint. CIR1186–87.

The jury was instructed that if they believe a witness testified falsely, they may “disregard the whole of the testimony of such witness, *except as he may have been corroborated by other credible witnesses or credible evidence.*” CIIR1678 (emphasis added). So even if the jury believed that Epifanio lied about Carter telling him that he was going to “rape, break and drive” the night of the murder, the jury would not likely disregard all the Tovar’s corroborated testimony about the gruesome details Carter told them about the murder, which were extensive.¹¹

Indeed, Epifanio’s account of Carter’s detailed description of killing Eva pre-dated any offer of financial assistance. And Carter confessed to materially the same details Epifanio gave at trial, and he confessed that he detailed the murder for Epifanio and Lucia. Both Epifanio and Lucia confirmed at the recent evidentiary hearing that the details they provided at trial about what Carter told them or demonstrated the night of the murder were true.

¹¹ Any allegedly false testimony by Epifanio or Lucia about any payments received or threats made by the police was not read aloud to the jury at resentencing. That testimony was only provided to the resentencing jury by transcript.

This timeline would give the jury, hearing the Tovar's testimony from the evidentiary hearing, no reason to doubt the substance of the Tovar's trial testimony about Carter's confession to them. So the district court's theory that had "'rape, break and drive,' been excluded from the penalty phase, at least one juror may have been persuaded that Carter was less morally culpable and did not deserve to die for his crime," R8943, approaches zero probability. While any jury *can* disregard any testimony for any reason, that does not represent the controlling standards here. There must be a reasonable likelihood of the jury doing so when considering all the evidence. The district court never accounts for that other evidence.

2. Other testimony and evidence corroborated Carter's intent to rape Eva.

There was unassailable evidence of Carter's intent to rape. Carter's statements to Pierpont when he confessed, and the physical evidence suggest Carter's intent to rape. And Eva certainly believed Carter intended to rape her because she begged him not to.

And even without an intent to rape, premeditated or otherwise, Carter still sexually degraded Eva by exposing her as he did, and he left her in fear of being raped while she bled out and Carter rummaged through her house.

The district court disregarded that while Epifanio first told Pierpont he did not remember Carter saying, after the murder, that he planned to rape

Eva, he eventually recalled that Carter told him he pulled her pants down but did not rape her because she was “on the rag.” *See* St.Ex.F.29–30,37–38,49–50. That tracks Epifanio’s trial testimony that Carter said he did not rape Eva because she was “on the rag.” CIR1136-41. Even if Carter did not convey a premeditated intent to rape during the first visit to the Tovars’ home, the intent is necessarily implied by his statement about what stopped him from raping Eva.

Although Epifanio did not initially disclose to police that Carter expressed plans to burgle and rape, Carter himself confessed to police that he broke into Eva’s home, took \$20 from her, killed her, and told Epifanio about it. *See* CIR.Ex.26. And Carter told Pierpont that he “thought about raping her but that she was on her period.” CIIR1132. What’s more, Epifanio told Perla — before the police could pay or threaten him — that Carter told him that Carter pulled Eva’s pants down. R7955,7972. This tracks how police found Eva’s body. CIIR1032-34.

Thus, the record shows a successful break-in and murder, an abandoned attempt to rape, and a completed sexual degradation of the victim. Carter’s intent for all these acts was plain, no matter what he told Epifanio before committing them. It is undisputed and fully corroborated that Carter intended to rape Eva at some point but did not. The district court’s

conclusions that had Epifanio's "rape, break and drive" statement "been excluded from the penalty phase, at least one juror may have been persuaded that Carter was less morally culpable and did not deserve to die for his crime" is wrong. R8943. That statement pales in comparison with Carter's undisputed post-crime confessions to police and Epifanio, which included an admission of his intent to rape, and the crime-scene evidence corroborating that admission.

Whether the jury were to discount Epifanio's testimony that Carter suggested a premeditated intent to rape the night of the murder, at some point Carter did form the intent to rape Eva but didn't follow through with it. The district court does not articulate how a premeditated intent to rape formed before he left the Tovars' house the night of the murder or formed later – right before, during, or after his murderous acts – would make it more or less likely that he would be sentenced to death. And it is irrelevant. That Carter thought about raping Eva at all and tried to do it – pulling her pants down to her ankles and removing her sanitary napkin – was damning enough. And since Carter sexually degraded Eva and left her to fear being raped while bleeding out, no jury would spare his life based on inadequate premeditation.

The district court essentially concluded that the jury would forgive Carter's clear, confessed, and uncontroverted sexual motive to punish Epifanio for lying. The court's conclusion simply does not follow from its premises.

3. The district court's sentencing phase prejudice analysis does not consider the entire evidentiary picture.

The district court supports its finding that Carter's *Brady* claim about coaching prejudiced him at the sentencing phase by summarizing *Tillman*, where relief was granted after it was revealed that evidence of coaching was not disclosed. R8940-42.

But *Tillman* is not this case. Indeed, the district court does not even analyze how the facts in *Tillman* compare to all the evidence here. It merely quoted large passages from this Court's decision in *Tillman*, and then, in one paragraph, summarized how the 1992 resentencing prosecutor used Epifanio's "rape, break and drive" testimony once in closing argument and again in rebuttal. R8942. It then concluded that "had 'rape, break and drive' been excluded from the penalty phase, at least one juror may have been persuaded that Carter was less morally culpable and did not deserve to die for his crime." R8943. The court's dearth of analysis leaves the parties and this Court to connect the dots on their own.

In *Tillman*, “the only direct evidence of Tillman’s involvement in the crime, indeed the only evidence of his involvement at all came from the testimony of [the witness].” *Tillman*, 2005 UT 56, ¶4 (citation omitted). Unlike Tillman, Carter confessed to the murder and to details that provided all the same material aggravation evidence that Epifanio and Lucia provided. So as explained above, Epifanio and Lucia’s testimony about what Carter told them or demonstrated was not critical to Carter’s sentence.

And the Tovars’ testimony had almost no airtime at resentencing. Their testimony went almost entirely to Carter’s guilt, and the sentencing court instructed the jury not to reconsider guilt. CIIR2448. And what little it added to the sentencing picture was, as explained, corroborated through consistency, corroborated by Carter’s confession, or inferable from unchallengeable evidence.

Indeed, the district court’s sentencing prejudice analysis relies only on attacking one piece of specific sentencing evidence without ever addressing what it had to – that it affected the entire evidentiary picture in such a way that met the relevant prejudice standard.

The court said that the “1992 resentencing prosecutor relied heavily upon [Epifanio’s “rape, break and drive” testimony] in seeking a death penalty” when he made one reference to it in closing argument and another

in rebuttal. R8942. But the jury did not sentence Carter to death based on the prosecutor's arguments, they sentenced Carter to death based on the overwhelming aggravating circumstances detailed above. Indeed, the jury was instructed that "[s]tatements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. You should disregard any such utterance that has no basis in evidence." CIIR1683. "[O]ur judicial system greatly relies upon the jury's integrity to uphold the jury oath, including its promise to follow *all* of the judge's instructions." *See State v. Harmon*, 956 P.2d 262, 272 (Utah 1998) (emphasis in original). No evidence suggests that the jury did not follow the trial court's detailed and clear instructions. The court had to presume that the jury followed that instruction and did not take the prosecutor's argument as evidence.

And the court never explains how telling the 1992 resentencing jury that Epifanio's "rape, break and drive" testimony was coached would have made all his other corroborated testimony less believable. Again, Epifanio confirmed that his testimony about what Carter told him about murdering Eva was true. *See Pet.Ex.1*.

The jury sentenced Carter to death because of the overwhelming aggravating circumstances and corroborated evidence of the heinous, cruel, and tortuous nature of the murder.

Thus, the Tovars' allegations of police coaching, payments, instructions to lie about the assistance, and threats of deportation—even if true and presented to Carter's resentencing jury—had no reasonable probability of affecting the jury's judgment at sentencing or undermining confidence in the death sentence. The district court erred when it ruled otherwise.

The district court's ruling and order granting Carter's postconviction petition and vacating his conviction and death sentence rested on an incorrect prejudice standard and erroneously shifted Carter's burden to prove that he is entitled to postconviction relief onto Respondent. The court's reliance on its error-ridden *Brady* prejudice analysis also infected its *Napue* prejudice analysis. And the court made other errors in its *Napue* analysis by imputing police knowledge to the prosecutor and sidestepping the fact that there was no claim that the 1992 sentencing prosecutor committed a *Napue* violation, and no testimony or evidence that he knew the "rape, break and drive" testimony was false. The court's conclusions are therefore erroneous, and this

Court should reverse the court's ruling and order granting Carter's postconviction petition and vacating his conviction and death sentence because Carter did not prove that he is entitled to relief.

II.

The district court abused its discretion when it allowed Carter to amend his petition with a new *Napue* claim after the evidentiary hearing.

In his post-evidentiary hearing briefing, Carter raised and discussed for the first time a *Napue* claim about Epifanio's "rape, break and drive" trial testimony. R8256-57. Respondent argued that the claim was untimely and procedurally barred under the PCRA because Carter could have raised that claim at trial, on appeal, or at the very latest in a previous postconviction petition; Carter knew that Epifanio did not tell Pierpont that in his police interview before trial. R8483-85. Carter responded that it was not barred because he could not have raised the claim until Epifanio testified at his deposition that someone told him to say "rape, break and drive." R8566.

In closing argument, the district court suggested to Carter's counsel that the "rape, break and drive" claim could stand alone as a *Brady* and *Napue* claim "if we have an amendment to the papers." R8699. At the hearing's end, Carter's counsel brought up his intention to amend the petition to add the standalone *Napue* claim about the "rape, break and drive" testimony, and the

court advised that counsel file a “Rule 15 motion to conform to the evidence.” R8795. The court eventually granted Carter’s motion. R8817.

The court abused its discretion when it allowed Carter to amend his petition with a new *Napue* claim—ten years after filing his petition, after discovery, and after the evidentiary hearing, post-hearing briefing, and arguments concluded—for two reasons. First, Respondent did not consent, either implicitly or explicitly, to this new *Napue* claim. Second, adding this new claim prejudiced Respondent because it could not ask the guilt-phase trial prosecutor Wayne Watson, now deceased, about Epifanio’s “rape, break and drive” testimony.¹² Whether the prosecutor knew Epifanio’s testimony was false is a required element of any *Napue* claim about that testimony. Thus, testimony from the prosecutor was crucial for Respondent to confront any *Napue* claim about the “rape, break and drive” testimony. The court abused its discretion when it endorsed Carter’s trial-by-ambush tactics and advised Carter to file and then granted Carter’s post-evidentiary hearing motion to amend his postconviction petition to include this untimely claim.

¹² And Respondent could not ask the resentencing prosecutor, James Taylor, if he had any knowledge as to whether Epifanio’s “rape, break and drive” testimony was false either, since the evidentiary hearing had ended, and Taylor was not called to testify.

A. Respondent did not consent, either implicitly or explicitly, to Carter's new *Napue* claim.

Utah Rule of Civil Procedure 15(b) provides for amended pleadings during and after trial. Rule 15(b) has two parts, one mandatory and one discretionary. *See Gen. Ins. Co. of Am. v. Carnicero Dynasty Corp.*, 545 P.2d 502, 505-06 (Utah 1976). The mandatory part says:

When an issue not raised in the pleadings is *tried by the parties' express or implied consent*, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Utah R. Civ. P. 15(b)(1) (emphasis added).

Respondent never—expressly or implicitly—consented to Carter's new *Napue* claim about Epifanio's "rape, break and drive" testimony. Indeed, Respondent expressly objected to Carter raising this new *Napue* claim after Carter made it in his post-evidentiary hearing brief for the first time. R8483-87.

And Respondent did not give its implied consent for Carter to try this new *Napue* claim either. "Implied consent to try an issue 'may be found where one party raises an issue material to the other party's case or where evidence is introduced without objection, where it appears that the parties understood the evidence is to be aimed at the unpleaded issue.'" *Hill v. Est. of Allred*, 2009

UT 28, ¶48, 216 P.3d 929 (cleaned up). But when “evidence is introduced that is relevant to a pleaded issue and the party against whom the amendment is urged has no reason to believe a new issue is being injected into the case, that party cannot be said to have impliedly consented to trial of that issue.” *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 105 (Utah 1998) (cleaned up).

The district court agreed that the “State did not have reason to object to Epifanio’s deposition testimony that ‘rape, break, and drive’ was a coached fabrication” because “[t]his testimony was relevant to Carter’s pled *Brady* claim—that the State coached Epifanio’s testimony and that Carter was prejudiced as a result” and because “the Utah Supreme Court in its remand decision specifically referenced ‘rape, break, and drive’ as potentially coached testimony prejudicial to Carter’s case.” R8828–29. Yet the court ruled that “during discovery and at the evidentiary hearing,...the State did have reason to believe that this unpleaded issue was being injected into the case.” R8829. The trial court erroneously reasoned, with no law in support, that because the “objective of improper coaching is that the witness testifies falsely, or testifies in a way that creates a false or misleading impression,” a *Brady* claim about witness coaching “will always include a *Napue* violation.” R8829.

The court erroneously concluded that because the State knew that Epifanio said in his deposition that Watson, Pierpont, or both coached him to say “rape, break and drive,” and that Epifanio said “rape, break and drive” at trial under Watson’s questioning, “the State [had] adequate notice that a new *Napue* claim had been injected into [the] case” because of the “inescapable nexus” that “coaching of a trial witness is intended to elicit from that witness false or misleading testimony.” R8829–30. The court’s ruling contradicts this Court’s rules and has no basis in law.

First, the district court’s blanket rule that a *Brady* claim about witness coaching “will always include a *Napue* violation” contradicts the Utah Rules of Civil Procedure. Under rule 65C, which governs postconviction proceedings, the “petition shall set forth *all claims* that the petitioner has in relation to the legality of the conviction or sentence.” Utah R. Civ. P. 65C(d) (emphasis added). And “the petitioner shall attach to the petition: affidavits, copies of records and other evidence in support of the allegations.” Utah R. Civ. P. 65C(e)(1). In other words, postconviction petitions are held to “a somewhat higher standard than the general pleading standard found in” the Utah Rules of Civil Procedure. *McNair v. State*, 2014 UT App 127, ¶9, 328 P.3d 874. The court’s suggestion that a related but unpleaded *Napue* claim is automatically included in a postconviction petition with any *Brady* claim

about coaching explicitly contradicts rule 65C's pleading standards and requirement that a postconviction petition include *all claims*.

Second, the court's blanket rule is simply wrong. As addressed above, unlike a *Brady* claim, police knowledge is not imputed to a prosecutor under *Napue*. See *supra* section I.C.2. Thus, witness testimony that police coached them to testify falsely could create a *Brady* claim but would not necessarily create a *Napue* claim if the prosecutor did not know that the testimony was false.

Third, the district court's blanket rule has no support in law. In no other circumstance or legal proceeding does raising one constitutional claim automatically bring another along with it. The court cites no case supporting its rule. That's because there aren't any. Cf. *Hall v. Commonwealth*, No. 1522-08-1, 2009 WL 3347089, at *4 (Va. Ct. App. 2009) ("Making one specific argument on an issue does not preserve a separate legal point on the same issue for review." (quoting *Edwards v. Commonwealth*, 589 S.E.2d 444, 448 (Va. Ct. App. 2003))); see also *Harvey v. Booker*, No. 7:19CV00596, 2020 WL 5778792, at *4 n.4 (W.D. Va. Sept. 28, 2020) (raising a claim about the violation of the speedy trial statute did not automatically raise the related constitutional claim).

Respondent could not have been on notice that Carter was trying a new, independent *Napue* claim about Epifanio's "rape, break and drive" testimony. As the district court admits, at most, Respondent assumed that evidence that Epifanio may have testified falsely when he said Carter told him he was going to "rape, break and drive" on the night of the murder goes to the materiality of his other previously pleaded *Brady* claim about coaching. See R8828-31. So while Epifanio's testimony about "rape, break and drive" may be relevant to a pleaded issue, Respondent had "no reason to believe a new issue [wa]s being injected into the case." *Keller*, 959 P.2d at 105. Thus, Respondent "cannot be said to have impliedly consented to trial of that issue." *Id.* (quoting *Domar Ocean Transp., Ltd. v. Indep. Refin. Co.*, 783 F.2d 1185, 1188 (5th Cir. 1986)). The court abused its discretion to allow the amendment.

B. The district court's decision prejudiced Respondent by depriving it of the opportunity to ask the prosecutors what they knew about Epifanio's "rape, break and drive" testimony, facts crucial to Carter's *Napue* claim.

Rule 15(b) provides that the "court should freely permit an amendment when doing so will aid in presenting the merits" unless "the evidence would prejudice [the objecting] party's action or defense on the merits." Utah R. Civ. P. 15(b)(2).

The district court agreed that any testimony at depositions or at the evidentiary hearing about Epifanio's "rape, break and drive" testimony was

relevant to the question of materiality of Carter's previously pleaded *Brady* claim about coaching. R8828–29. But the court did not analyze how Carter adding a stand-alone *Napue* claim about Epifanio's "rape, break and drive" testimony at the eleventh-hour prejudiced Respondent. The court acknowledged that Respondent argued that it was prejudiced because it could no longer ask the prosecutors what they knew about Epifanio's "rape, break and drive" testimony—knowledge crucial to prove whether a *Napue* violation occurred. R8830. Yet the court faulted Respondent for not showing "how the 1992 sentencing prosecutor's knowledge is relevant to the *Napue* claim" and pointed out that Carter "conceded that the 1992 sentencing prosecutor's knowledge is irrelevant to that claim." R8830.

First, what Carter thinks about the relevance of the resentencing prosecutor's knowledge to the penalty-phase *Napue* claim does not govern whether it is relevant under the law. And Respondent *did* explain how the resentencing prosecutor's knowledge is relevant to Carter's penalty-phase *Napue* claim.

In its memorandum opposing amending the petition, Respondent explained that the resentencing prosecutor's knowledge "is critical to Carter's claim because the 1992 sentence is the only judgment under review. Even if Carter had properly pleaded the claim he now seeks to amend, he has

adduced no evidence about whether his 1992 judgment is tainted by the 1992 prosecutor knowingly letting perjury go uncorrected. This goes for his pleaded *Napue* claim too.” R8648 n.1. Simply put, whether the resentencing prosecutor knew whether the “rape, break and drive” testimony was false is crucial to any *Napue* claim about Carter’s sentence. If the penalty-phase prosecutor did not know that Epifanio’s “rape, break and drive” testimony was false, then he could not have knowingly committed a *Napue* violation at the penalty-phase.¹³ See *supra* section I.C.2.

Nor did the court consider the other reason Respondent argued it was prejudiced by allowing Carter to add a stand-alone *Napue* claim to his petition *after* the evidentiary hearing. Namely, that Respondent could not ask Watson whether he told Epifanio to say, “rape, break and drive” at trial, and whether he knew that Epifanio’s “rape, break and drive” testimony was false because Watson is deceased. If Carter had timely raised this *Napue* claim, Respondent could have asked Watson at his deposition whether he was attempting to correct Epifanio’s false testimony.

¹³ Indeed, the district court found that Carter failed to prove that Watson knew that Epifanio’s “rape, break and drive” testimony was false. R8927.

But Carter never asked Watson any questions about Epifanio's "rape, break and drive" testimony. And Carter never called the 1992 resentencing prosecutor to ask him what he knew about Epifanio's "rape, break and drive" trial testimony. *See* Utah Code Ann. § 78B-9-105 (Carter bears the burden of proof in this postconviction case). Respondent could not know—and was under no obligation—to ask Watson or Taylor about it. And because Carter raised this new *Napue* claim for the first time in his post-evidentiary hearing briefing after Watson died, Respondent can never ask Watson these questions, and the parties and the district court could only speculate. That is what the court did when it ruled that Carter proved his *Napue* claim about the "rape, break and drive" testimony. *See* R8944–45.

C. The district court's error was not harmless because it based its ruling and order vacating Carter's criminal judgment in part on Carter's new *Napue* claim.

The district court's error was not harmless. "Harmless errors are errors which, although properly preserved below and presented on appeal, are sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings." *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992) (cleaned up).

The district court based its ruling and order vacating Carter's criminal judgment in part on Carter's new *Napue* claim about Epifanio's "rape, break

and drive” testimony. R8943–46. Without this claim, and for all the reasons explained above, the court would not have granted Carter postconviction relief based only on Carter’s *Napue* claim about Epifanio’s testimony that he only received a \$14 witness fee from the State given the entire record. *See supra* sections I.C.

“[M]otions to amend are typically deemed untimely when they are filed in the advanced procedural stages of the litigation process, such as after the completion of discovery” or “filed several years into the litigation.” *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, ¶¶29–30, 87 P.3d 734. “In such cases, the ongoing passage of time makes it increasingly difficult for the nonmoving party to effectively respond to the new allegations or claims.” *Id.* ¶30. Indeed, “[p]arties in such circumstances are often hindered by witnesses who have since moved or died, by their shaky memories and recollections, or by documents which have since been lost or destroyed.” *Id.* Motions to amend at litigation’s end, like Carter’s, are disfavored for this very reason. *See id.* The district court rubber stamped Carter’s litigation-by-ambush tactics, and even advised Carter’s counsel how to do it. *See* R8795. But in doing so, the court took from the State any ability to use the adversarial system to defend against the claim.

III.

The district court violated this Court's mandate when it reconsidered its pre-appeal evidentiary rulings on Watson's deposition testimony on remand from this Court.

Carter moved to introduce Watson's entire deposition transcript at the evidentiary hearing because Watson had died. R4291-372. Respondent agreed that it could be introduced but argued that the mandate rule strictly prohibited the court from reconsidering on remand anything it had ruled inadmissible before the last appeal. R4386-4462; *see also Carter VI*, 2019 UT 12 ¶¶164-65. The district court erroneously conflated the inflexible mandate rule with the general law-of-the-case doctrine, smuggling the latter's limited exceptions into the former, which has no exceptions. If the mandate rule applied, as the court correctly determined it did, then no exceptions allowed the court to reconsider its pre-appeal rulings on Respondent's objections to Watson's deposition testimony after remand. So the district court's pre-appeal rulings must stand, and the court could not consider inadmissible testimony when determining Watson's credibility.

A. The mandate rule deprived the district court of any discretion to reconsider its pre-appeal evidentiary rulings on Watson's deposition testimony after this Court affirmed those rulings and remanded.

"The law of the case doctrine encompasses several different principles related to the binding effect of a decision on subsequent proceedings in the

same case.” *IHC Health Servs., Inc. v. D&K Mgmt., Inc.*, 2008 UT 73, ¶26, 196 P.3d 588; see *Thurston v. Box Elder Cnty.*, 892 P.2d 1034, 1037 n.2 (Utah 1995) (“Law of the case terminology has been applied to a number of distinct set of problems,” including “justify[ing] a trial court’s refusal to reconsider matters in a continuing proceeding” and “to express the principle that inferior tribunals are bound to honor the mandate of superior courts within a single judicial system”). “Depending on the procedural posture of a case at the time the law of the case doctrine is invoked, the district court may or may not have discretion to reconsider a prior decision it has made.” *IHC Health Servs., Inc.*, 2008 UT 73, ¶27.

“As long as the case has not been appealed and remanded, reconsideration of an issue before a final judgment is within the sound discretion of the district court.” *Id.* There are three exceptional circumstances where the general law-of-the-case doctrine does not apply and a court may revisit an issue it has already decided: when (1) there has been an intervening change of controlling authority; (2) new evidence has become available; or (3) the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice. *Id.* ¶34 (quoting *Gildea v. Guardian Title Co. of Utah*, 2001 UT 75, ¶9, 31 P.3d 543).

But “[o]ne branch of the doctrine, often called the mandate rule, dictates that pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case.” *Thurston*, 892 P.2d at 1037–38. “The mandate rule, unlike the law of the case before a remand, binds both the district court and the parties to honor the mandate of the appellate court.” *IHC Health Services, Inc.*, 2008 UT 73, ¶28. In other words, “[t]he application of the mandate rule lacks the flexibility found in other branches of the law of the case doctrine.” *Thurston*, 892 P.2d at 1038. Indeed, “[t]he mandate must be followed even though the lower court subsequently addressing the issue may believe that the issue could have been better decided in another fashion.” *Id.* “This serves the dual purpose of protecting against the reargument of settled issues and of assuring adherence of lower courts to the decisions of higher courts.” *Id.* Simply put, there are no exceptions to the mandate rule.

And the mandate rule is not limited to issues expressly decided on appeal: the “mandate rule dictates that...prior decisions of a district court become mandatory after an appeal and remand.” *Brady v. Park*, 2019 UT 16, ¶45, 445 P.3d 395 (cleaned up). “The mandate rule is especially important in a case, such as this, that involves parties locked in seemingly endless cycles of litigation.” *Id.* ¶46. “For this reason,” this Court “will enforce the mandate

rule if the district court disturbed any of its pre-appeal factual findings or legal conclusions, or a legal determination of the court of appeals.” *Id.*

The procedural posture here made applying the mandate rule straightforward. Respondent objected to several portions of Watson’s deposition testimony. R2328–53. Carter opposed Respondent’s objections, the district court ruled on those objections, and this Court explicitly affirmed the court’s rulings about Watson’s deposition testimony and remanded. R2377–97,2404–45; *Carter VI*, 2019 UT 12 ¶¶164–65 (“Carter has not provided briefing arguing that we should reverse the district court’s ruling on [the State’s objections to portions of Watson’s deposition]. Because Carter has not briefed the issue, we do not reach it and we affirm the district court’s holding with respect to this evidence.”). Any attempt to reconsider those rulings fit within the mandate rule’s inflexible prohibition against reconsidering final district court rulings after affirmance and remand. The district court could not reconsider them. When it did, it committed reversible error.

The district court correctly construed the mandate rule to include two iterations: (1) when an appellate court makes pronouncements on legal issues; and (2) a district court’s prior decisions after an appeal and remand “even if they are not appealed.” R7489 (quoting *Park*, 2019 UT 16, ¶45). And the court correctly ruled that “the mandate rule applies to the State’s current

objections” because “[t]here is no dispute that the district court made pre-appeal rulings on the objections to the Wayne Watson deposition.” R7489. The court’s analysis should have ended there. *See Park*, 2019 UT 16, ¶46.

Yet the court continued, “[w]hether the first iteration of the mandate rule applies turns on whether the Supreme Court reached the merits of the State’s objections to the Watson deposition.” R7489. The court compared the circumstances here to those in *Park*, 2019 UT 16, and concluded that this Court “did not reach the objections to the Wayne Watson deposition.” R7490–92.

But the circumstances here are not like those in *Park*. There, “neither the pre-appeal district court nor the court of appeals had previously decided” the issue of whether the Note required the 10 percent late fees to be paid to bring the Note current. 2019 UT 16, ¶43. This Court held that the issue “never became the law of the case under the mandate rule, and so the district court on remand was free to decide the issue.” *Id.* Here, by contrast, the mandate rule does apply because, as the district court agreed, it “did make pre-appeal rulings on each of the State’s objections to the Watson deposition.” R7492.

And whether this Court reached the merits of the State’s objections to Watson’s deposition testimony is a question that the district court did not need to answer. The court concluded that the mandate rule applied because it had made pre-appeal rulings on Respondent’s objections to Watson’s

deposition testimony. And this Court affirmed on appeal and remanded. But then the court incorrectly determined that it was bound by its prior rulings “unless an exception to the mandate rule applies.” R7492.

The district court erroneously conflated the limited exceptions to the general law-of-the-case doctrine and the inflexible mandate rule. Indeed, the court quoted *Gildea* to suggest that the mandate rule “is not applied inflexibly” and then described the three exceptional circumstances where a district court may reconsider its prior ruling. R7492 (quoting 2001 UT 75, ¶9). But this Court did not apply the mandate rule in *Gildea*. Indeed, in that case, this Court never mentioned the mandate rule. It only applied the general law-of-the-case doctrine, which is subject to limited exceptions, because it was reconsidering its own prior ruling. *Gildea*, 2001 UT 75, ¶¶9–10.

In other words, the flexibility provided to the general law-of-the-case doctrine applies when a court is reconsidering its own decision, e.g., this Court reconsidering its own prior ruling or a district court reconsidering its own prior ruling before appeal and remand. But when a lower court’s rulings have gone up on appeal, been affirmed and remanded, the district court cannot reconsider its own rulings on remand. *See, e.g., State v. Clopten*, 2015 UT 82, ¶42, 362 P.3d 1216 (the mandate “rule, if it applied in this case, would presumably not only prohibit the [third] trial court from reconsidering the

reliability of Ms. Pantoja's testimony, but also prohibit [the supreme court] from considering Ms. Pantoja's reliability on appeal" because the judge who presided over the second trial "had already decided that issue."). Indeed, that would in effect be overruling this Court, which a district court simply cannot do.

Thus, the court misapplied the law when it said that the mandate rule "is not applied inflexibly." *See* R7492. The mandate rule *is* inflexible. It is only the general law-of-the-case doctrine where limited circumstances allow a district court to reconsider its prior rulings before appeal and remand. *IHC Health Services, Inc.*, 2008 UT 73, ¶28; *Thurston*, 892 P.2d at 1038 ("The application of the mandate rule lacks the flexibility found in other branches of the law of the case doctrine."). Thus, the district court erred when it applied the general law-of-the-case doctrine's limited exceptions to overrule its prior evidentiary rulings on objections to Watson's deposition testimony. The mandate rule precluded the district court from reconsidering its pre-appeal rulings after this Court "affirm[ed] the district court's holding with respect to this evidence." *Carter VI*, 2019 UT 12 ¶¶164–65.

B. The error was not harmless because the district court partially based its ruling on testimony it was precluded from considering when it determined Watson's credibility.

The district court found that "Wayne Watson was not a credible witness." R8904. The court based this credibility finding in significant part on testimony it ruled pre-appeal was inadmissible and erroneously reconsidered it, thereby violating this Court's mandate. The court's error was not harmless because it tainted its credibility findings, which justified its ultimate factual findings and legal conclusions.

Indeed, the court found that "Watson clearly took Carter's PCRA case as an affront to him personally." R8906 (citing Pet.Ex.4 at 60,62-64). The district court ruled that this testimony was inadmissible pre-appeal. R2409. The court violated the mandate rule when it reconsidered and overruled its pre-appeal ruling after remand; it should not have considered this testimony when it considered Watson's credibility. R7496-98.

And the court found that "Watson's asides to counsel for the State manifested a general disrespect for the deposition and these proceedings." R8907 (quoting Pet.Ex.4 at 68,74-75,78). The court ruled that this testimony was inadmissible pre-appeal. R2409-10. The court violated the mandate rule when it reconsidered and overruled its pre-appeal ruling after remand; it

should not have considered this testimony when it considered Watson's credibility. R7498–502.

The district court's credibility findings about Watson were crucial to the court's ultimate factual findings and legal conclusions. Indeed, because the court did not find Watson to be a credible witness, it discounted Watson's testimony that Carter's trial counsel knew about payments to the Tovars, which was crucial to Carter's *Brady* and *Napue* claims. *See* R8913. Thus, the district court's mandate rule violation was not harmless. *See Hamilton*, 827 P.2d at 240.

CONCLUSION

For these reasons, the Court should reverse.

Dated July 10, 2023.

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CERTIFICATE OF COMPLIANCE

Page/Word Certification. I certify that in compliance with the Court's June 26, 2023 order, this brief contains 34,951 words, excluding tables, addenda, and certificates of counsel.

Public/Protected Records Certification. I also certify that in compliance with rule 21, Utah R. App. P., this brief, including any addenda:

☒ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy, with all non-public information removed, will be filed within 7 days.

/s/ Daniel L. Day

DANIEL L. DAY

Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on July 10, 2023, the Brief of Appellant, including any addenda, was filed with the Court by email in a searchable PDF attachment and served upon appellee Douglas Stewart Carter's counsel of record at:

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/s/ Melissa Walkingstick Fryer

- * No more than 7 days after filing by email, the State will file with this Court the required number of paper copies of the brief and any addenda (six to Court of Appeals or 8 to Supreme Court). Upon request, the State will serve two paper copies thereof to the appellee's counsel of record. *See* Utah R. App. P. 26(b).

Addenda

Addendum A

Utah Code Annotated § 78B-9-104 (2023) Grounds for relief--Retroactivity of rule

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, an individual who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for postconviction relief to vacate or modify the conviction or sentence upon the following grounds:

- (a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;
- (b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;
- (c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;
- (d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;
- (e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:
 - (i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;
 - (ii) the material evidence is not merely cumulative of evidence that was known;
 - (iii) the material evidence is not merely impeachment evidence; and
 - (iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received;
- (f) the petitioner can prove that:
 - (i) biological evidence, as that term is defined in Section 53-20-101, relevant to the petitioner's conviction was not preserved in accordance with Title 53, Chapter 20, Forensic Biological Evidence Preservation;
 - (ii) (A) the biological evidence described in Subsection (1)(f)(i) was not tested previously; or
 - (B) if the biological evidence described in Subsection (1)(f)(i) was tested previously, there is a material change in circumstance, including a scientific or technological advance, that would make it plausible that a test of the biological evidence described in Subsection (1)(f)(i) would produce a favorable test result for the petitioner; and

(iii) a favorable result described in Subsection (1)(f)(ii), which is presumed for purposes of the petitioner's action under this section, when viewed with all the other evidence, demonstrates a reasonable probability of a more favorable outcome at trial for the petitioner;

(g) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:

(i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or

(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted; or

(h) the petitioner committed any of the following offenses while subject to force, fraud, or coercion, as defined in Section 76-5-308:

(i) Section 58-37-8, possession of a controlled substance;

(ii) Section 76-10-1304, aiding prostitution;

(iii) Section 76-6-206, criminal trespass;

(iv) Section 76-6-413, theft;

(v) Section 76-6-502, possession of forged writing or device for writing;

(vi) Sections 76-6-602 through 76-6-608, retail theft;

(vii) Subsection 76-6-1105(2)(a)(i)(A), unlawful possession of another's identification document;

(viii) Section 76-9-702, lewdness;

(ix) Section 76-10-1302, prostitution; or

(x) Section 76-10-1313, sexual solicitation.

(2) The court may not grant relief from a conviction or sentence unless in light of the facts proved in the postconviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing:

(a) the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome; or

(b) if the petitioner challenges the conviction or the sentence on grounds that the prosecutor knowingly failed to correct false testimony at trial or at sentencing, the petitioner establishes that the false testimony, in any reasonable likelihood, could have affected the judgment of the fact finder.

(3) (a) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence.

(b) Claims under Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence, of this chapter may not be filed as part of a petition under this part, but shall be filed separately and in conformity with the provisions of Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence.

Utah Code Annotated § 78B-9-105 (2023) Burden of proof

- (1)
 - (a) Except for claims raised under Subsection 78B-9-104(1)(h), the petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.
 - (b) For claims raised under Subsection 78B-9-104(1)(h), the petitioner has the burden of pleading and proving by clear and convincing evidence the facts necessary to entitle the petitioner to relief.
 - (c) The court may not grant relief without determining that the petitioner is entitled to relief under the provisions of this chapter and in light of the entire record, including the record from the criminal case under review.
- (2) The respondent has the burden of pleading any ground of preclusion under Section 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

Utah Code Annotated § 78B-9-106 (2023) Preclusion of relief--Exception

- (1) A petitioner is not eligible for relief under this chapter upon any ground that:
 - (a) may still be raised on direct appeal or by a post-trial motion;
 - (b) was raised or addressed in the trial court, at trial, or on appeal;
 - (c) could have been but was not raised in the trial court, at trial, or on appeal;
 - (d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for postconviction relief; or
 - (e) is barred by the limitation period established in Section 78B-9-107.
- (2)
 - (a) The state may raise any of the procedural bars or time bar at any time, including during an appeal from an order granting or denying postconviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.
 - (b) Any court may raise a procedural bar or time bar on the court's own motion, provided that the court gives the parties notice and an opportunity to be heard.
- (3)
 - (a) Notwithstanding Subsection (1)(c), a petitioner may be eligible for relief on a basis that the ground could have been but was not raised in the trial court, at trial, or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.
 - (b) Notwithstanding Subsections (1)(c) and (1)(d), a petitioner may be eligible for relief on a basis that the ground could have been but was not raised in the trial court, at trial, on appeal, or in a previous request for postconviction relief, if the failure to raise that ground was due to force, fraud, or coercion as defined in Section 76-5-308.
- (4) This section authorizes a merits review only to the extent required to address the exception set forth in Subsection (3).
- (5) This section does not apply to a petition filed under Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence.

Utah R. Evid. 106 (2023) Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time.

Utah R. Evid. 613 (2023) Witness's Prior Statement

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Utah R. Evid. 801 (2023) Definitions that Apply to this Article; Exclusions from Hearsay

(a) Statement. “Statement” means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. “Declarant” means the person who made the statement.

(c) Hearsay. “Hearsay” means a statement that:

- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

- (A) is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten, or
- (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
- (C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

- (A) was made by the party in an individual or representative capacity;
- (B) is one the party manifested that it adopted or believed to be true;
- (C) was made by a person whom the party authorized to make a statement on the subject;
- (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
- (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Utah R. Civ. P. 15 (2023) Amended and Supplemental Pleadings

(a) Amendments Before Trial.

- (1) A party may amend its pleading once as a matter of course within:
 - (A) 21 days after serving it; or
 - (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
- (2) In all other cases, a party may amend its pleading only with the court's permission or the opposing party's written consent. The party must attach its proposed amended pleading to the motion to permit an amended pleading. The court should freely give permission when justice requires.
- (3) Any required response to an amended pleading must be filed within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

- (1) When an issue not raised in the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment-- to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.
- (2) If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(c) Relation Back of Amendments. An amendment to a pleading relates back to the date of the original pleading when:

- (1) the law that provides the applicable statute of limitations allows relation back;
- (2) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or
- (3) the amendment adds a party, substitutes a party, or changes the name of the party against whom a claim is asserted, if paragraph (c)(2) is satisfied and if, within the period provided by Rule 4(b) for serving the summons and complaint, the party to be brought in by amendment:

- (A) received such notice of the action that it will not be prejudiced in defending on the merits; and
- (B) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to file a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party respond to the supplemental pleading within a specified time.

Utah R. Civ. P. 52 (2023) Findings and Conclusions by the Court; Amended Findings; Waiver of Findings and Conclusions; Correction of the Record; Judgment on Partial Findings

(a) Findings and Conclusions.

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court must find the facts specially and state separately its conclusions of law. The findings and conclusions must be made part of the record and may be stated in writing or orally following the close of the evidence. Judgment must be entered separately under Rule 58A.

(2) In granting or refusing interlocutory injunctions the court must similarly set forth the findings of fact and conclusions of law that support its action.

(3) A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(4) Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the credibility of the witnesses.

(5) The findings of a master, to the extent that the court adopts them, must be considered as the findings of the court.

(6) The trial court need not enter findings of fact and conclusions of law in rulings on motions granted under Rules 12(b), 50, 56, and 59, but, when the motion is based on more than one ground, the court must issue a brief written statement of the ground for its decision.

(b) Amended or Additional Findings. Upon motion of a party filed no later than 28 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Waiver of Findings of Fact and Conclusions of Law. Except in actions for divorce, the parties may waive findings of fact and conclusions of law:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the action;
- (3) by oral consent in open court, entered in the minutes.

(d) Correction of the Record. If anything material is omitted from or misstated in the transcript of an audio or video record of a hearing or trial, or if a disagreement arises as to whether the record accurately discloses what occurred in the proceeding, a party may move to correct the record. The motion must be

filed within 14 days after the transcript of the hearing is filed, unless good cause is shown. The omission, misstatement or disagreement will be resolved by the court and the record made to accurately reflect the proceeding.

(e) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter non-final judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A non-final judgment on partial findings must be supported by findings of fact and conclusions of law as required by paragraph (a).

Utah R. Civ. P. 65C (2023) Post-Conviction Relief

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural Defenses and Merits Review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) Commencement and Venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the Petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

- (1) whether the petitioner is incarcerated and, if so, the place of incarceration;
- (2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;
- (3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;
- (4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;
- (5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) Attachments to the Petition. If available to the petitioner, the petitioner shall attach to the petition:

- (1) affidavits, copies of records and other evidence in support of the allegations;
- (2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;
- (3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and
- (4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of Authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h) Summary Dismissal of Claims.

- (1) The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.
- (2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:
 - (A) the facts alleged do not support a claim for relief as a matter of law;
 - (B) the claim has no arguable basis in fact; or
 - (C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.

(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of Petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve upon the respondent a copy of the petition, attachments, memorandum, and an electronic court record of the underlying criminal case being challenged, including all non-public documents. If an electronic appellate record of the underlying case has not already been created, the clerk will create the record.

(1) If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. Service on the Attorney General shall be by mail at the following address:

Utah Attorney General's Office
Criminal Appeals
Post-Conviction Section
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

(2) In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of Pro Bono Counsel. If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(k) Answer or Other Response. Within 30 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus

time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(l) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

- (1) consider the formation and simplification of issues;
- (2) require the parties to identify witnesses and documents; and
- (3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(m) Presence of the Petitioner at Hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(n) Discovery; Records.

- (1) Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.
- (2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.
- (3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

(o) Orders; Stay.

- (1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give written

notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(q) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Addendum B

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

DOUGLAS STEWART CARTER, Plaintiff, v. STATE OF UTAH, Respondent.	<u>RULING AND ORDER</u> GRANTING PETITION FOR POST-CONVICTION RELIEF Case No. 150400825 Judge Derek P. Pullan
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THE MATTER IS BEFORE THE COURT on Petitioner Douglas Stewart Carter's Petition for Post-Conviction Relief ("the Petition"). The Court held a four-day evidentiary hearing in November 2021. Carter filed post-hearing briefing on January 31, 2022. (Dkt. 668). Respondent State of Utah filed an opposing brief on March 17, 2022, and Carter filed a reply on April 15, 2022.

The parties appeared for closing argument on June 9, 2022. At that hearing, the Court granted Carter leave to file a motion to amend the Petition to conform to the evidence presented at the evidentiary hearing. Because the motion to amend impacted the scope of the Petition, the Court delayed ruling on the merits of the Petition until after the motion to amend could be briefed and decided.

Carter moved to amend the Petition on June 13, 2022. The State filed its opposition memorandum on June 23, 2022. Carter replied on June 27, 2022. The Court granted the Motion to Amend on August 25, 2022. After this ruling issued, the Court took the Petition under advisement.

Having carefully considered the evidence and arguments presented, the Court now enters the following:

RULING

1. Claims for Relief

Carter argues that his conviction was obtained and his sentence imposed in violation of both the United States and Utah Constitutions. *See* § 78B-9-104(1)(a). His argument rests on four claims:

- The prosecutor violated *Brady v. Maryland* by failing to disclose material evidence that Carter could have used to impeach the testimony of Epifanio and Lucia Tovar, two key witnesses for the prosecution at trial. Specifically, the State failed to disclose evidence that police had (1) paid financial benefits to and on behalf of the Tovars prior to trial; and (2) threatened the Tovars with arrest, deportation, and loss of their child. *See* Petition, at 31.
- The prosecutor violated *Brady v. Maryland* by failing to disclose that police coached Epifanio to give false testimony at trial. Specifically, police instructed Epifanio (1) not to testify about the police having paid his living expenses prior to trial; and (2) to testify that immediately prior to the murder Carter said he was going to go “rape, break, and drive” when in fact Carter had never said this.
- The prosecutor violated *Napue v. Illinois*, by failing to correct false testimony from Epifanio about the financial benefits paid to him or on his behalf prior to trial.
- The prosecutor violated *Napue v. Illinois* by failing to correct false testimony from

Epifanio about Carter expressing intent to go “rape, break, and drive” before the murder.

2. Summary of the arguments made by the parties

a. Carter’s Arguments

With respect to his *Brady* claims, Carter argues that the State suppressed evidence that the Tovars were threatened with arrest, deportation, and the loss of their son if they did not cooperate with the police. In addition, the State suppressed evidence that the Tovars were given financial benefits by the police.

Carter also argues that the State suppressed evidence that the police or the prosecutor coached Epifanio to testify falsely about the financial benefits he received and about Carter saying he was going to “rape, break, and drive” before the murder. Carter concedes that there was no direct quid pro quo—i.e. “testify falsely or you will be arrested, deported, and lose your son.” Rather, the threats created an atmosphere in which the Tovars came to believe they must cooperate with the instruction to lie or suffer threatened consequences.

This atmosphere was aggravated when Lucia confided in Provo Police Officer Richard Mack (“Officer Mack”) that she was afraid of being deported. Officer Mack responded, “As long as you’re working with us, it’s not going to happen.” Officer Mack’s response created an implicit *quid pro quo*: if the Tovars helped the police, the police would help the Tovars. *See* Pet. Memo., at 43.

Carter further argues that an “open file policy” is not enough to obviate the need for the prosecution to provide favorable evidence to the defense. *See* Pet. Memo., at 47 (citing *Smith v. Sec’y of New Mexico Dep’t of Corr.*, 50 F.3d 801, 833 (10th Cir. 1995) (“[W]e once again reject

the prosecution's reliance on its 'open file' policy [to excuse its failure to properly disclose favorable information to the defense]."); *Strickler v. Green*, 527 U.S. 263, 282-85 (1995) (rejecting prosecution argument that disclosure was unnecessary because it maintained an open file policy)).

With respect to his *Napue* claims, Carter first argues police paid the Tovars thousands of dollars in financial benefits prior to trial, that the prosecutor Wayne Watson ("Watson") knew about the payments, that Epifanio lied when he told the jury the only benefit he received from the government was a check for \$14, and that Watson failed to correct this false testimony. Second, Carter argues that either (1) Provo Police Lieutenant George Pierpont ("Lieutenant Pierpont"), in Watson's presence, told Epifanio to testify that Carter said he was going to go "rape, break, and drive" before the murder; or (2) Watson told Epifanio to say this. Either way, when Epifanio gave this false testimony at trial, Watson knew the testimony was false and failed to correct it.

Carter argues that these *Brady* and *Napue* violations were material. He contends that the violations were prejudicial because:

- Had Carter known the Tovars were threatened, given financial benefits, and had their testimonies coached by the police, he could have more effectively argued that the Tovars' testimonies were manufactured to curry favor with the government. Pet. Memo., at 46. According to Carter, no physical evidence connected him to the crime. Therefore, his conviction rested on two pillars of evidence, the Tovars' testimony and Lieutenant Pierpont's recitation of Carter's confession.
- Because evidence at the hearing shows Lieutenant Pierpont threatened Epifanio *before* he interviewed him, Carter could have argued at trial that Epifanio

fabricated Carter's confession to him to please Lieutenant Pierpont. Pet. Memo., at 55. Once he falsely implicated Carter, Epifanio maintained the lie because of the financial benefits he received from the police. *Id.* at 62. And as the payments cumulated, Epifanio's testimony evolved to become more favorable to the State. The most glaring example of this evolution is Epifanio's eleventh hour disclosure about the location of the gun. *Id.* at 63. Lucia's testimony also evolved over time to become more favorable to the State. By the time of trial, her account of the demonstration Carter performed in her home after the murder had become more detailed. *Id.* at 65.

- Had this evidence not been suppressed, the jury would have had grounds upon which to doubt not only the Tovars' testimony but that of Lieutenant Pierpont too. *Id.* Lieutenant Pierpont's involvement in the coaching of Epifanio's testimony would have rendered his testimony about Carter's confession suspect.
- Carter argues that the *Brady* and *Napue* violations are material, notwithstanding his confession to Lieutenant Pierpont. This is so because, without the Tovars' testimony, the confession may not have been able to stand on its own. *Id.* at 67, 71. Furthermore, while there is factual overlap between the narrative in Epifanio's testimony and the narrative in Carter's confession, each narrative contains unique facts. Carter's stated intent to "rape, break, and drive" and his direction for Epifanio to dispose of the gun derive solely from Epifanio's testimony, not the confession. And only the confession—not Epifanio's testimony—contained evidence that Carter stole \$20 worth of bills from the victim's purse, tied the victim's hands behind her back, and murdered the victim in the television room of

the home. *Id.* at 74.

- Furthermore, Perla LaCayo's ("Perla") testimony would not have rehabilitated Epifanio's testimony. Carter asserts the State would not have called Perla to testify, even if Epifanio's testimony had been impeached with the suppressed evidence. According to Carter, Epifanio's trial testimony *was* attacked as being the product of improper motives—i.e. his motive to avoid arrest and prosecution for helping Carter escape to Wendover, and his motive to avoid deportation. The State could have called Perla to testify about Epifanio's consistent statements made to her before these motives to fabricate arose, but made a strategic decision not to. Given this decision, it is unlikely the State would have reversed course and called Perla to rebut the suggestion that Epifanio's testimony was the product of other improper motives (i.e. police threats or police payments). *Id.* at 75.
- If the State had called Perla for this purpose, she could have then been impeached with her prior inconsistent statements and been found not credible. She could also have been examined about how the police had threatened her with deportation and the loss of her children. This testimony would have hindered the State more than helped it. Finally, even if Perla was called, she would not have corroborated Epifanio's testimony about "rape, break, and drive" and about Carter directing him to dispose of the gun.
- With regard to the penalty phase specifically, Carter argues that Watson relied heavily on the statement "rape, break, and drive" when advocating for the death penalty.¹ Pet. Memo., at 40. All the evidence supporting Carter's premeditated

intent to rape and his laughing and relishing in the crime came from the Tovars. Because all that is necessary to avoid the death penalty is a “single doubting juror,” any impeachment of the Tovars’ credibility could have made the difference between life and death for Carter. This is especially true because the jurors were instructed that if they found that a witness had lied, they could disregard the testimony altogether.

- Finally, while not argued as a separate claim, Carter argues that had he known about the suppressed evidence, he could have argued that the Tovar transcripts should not have been admitted at the 1992 penalty phase. Specifically, he could have argued that admitting the transcripts was improper because he was denied the right to cross-examine the Tovars about the suppressed evidence.

b. The State’s Opposing Arguments

At the outset, the State challenges the legal basis for two propositions underlying Carter’s claims: (1) that admitting the suppressed evidence would have changed evidentiary *rulings* admitting the Tovars’ testimony and Carter’s confession to Lieutenant Pierpont; and (2) that PCRA review is limited to whether the suppressed evidence and false testimony undermine confidence in the verdict and sentence.

As to the first proposition, the State contends that the standards found in *Brady*, *Napue*, and the PCRA focus on what the *fact-finder* would have done with the undisclosed information, not whether judicial rulings would have changed. Furthermore, the mandate rule and the law of the case dictate that this court cannot disturb the admissibility of Carter’s confession.

As to the second proposition, the State contends that “in evaluating [prejudice], it is

¹ This argument is not supported by the record. Watson did not reference the phrase “rape, break, and drive” during his closing argument in either the guilt or penalty phases of the 1985 trial. The second prosecutor in the 1992 penalty phase *did* rely on the phrase “rape, break, and drive.”

necessary to consider all the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path.” *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam). And under that inquiry, the Utah Supreme Court said, “[w]e look back to what would have happened at” the petitioner’s “original trial, but we do it with the benefit of what we know thanks to the evidentiary hearing.” *Ross v. State of Utah*, 2019 UT 48, ¶ 90. If prejudice were determined in light of the newly discovered evidence alone, the analysis “would improperly and artificially compartmentalize the inquiry.” *Id.* ¶ 92.

In other words, “asking whether the Court can retain confidence in the outcome requires it to consider all the known evidence, not to simply ask how the litigants would have ‘played [their] cards differently.’” Opp. Memo., at 100-101 (quoting *Ross*, 2019 UT 48, ¶ 93.). This ensures that PCRA review is “a search for the truth, not just a war game where the Court runs through the players’ strategies to see who wins. Fairness and a reliable verdict, not the probable gamesmanship of idiosyncratic litigants, is the focus.” *Id.*

Thus, when considering whether any *Brady* or *Napue* violation is material, the Court must view the violations in light of all relevant evidence in the record that would have been offered had the suppressed evidence been disclosed to and used by the defendant at trial and had the false testimony been corrected. This evidence would have encompassed a wide-range facts, whether presented at trial or not, including: (1) Carter’s confession, (2) Epifanio’s prior consistent statements to Perla, (3) Epifanio’s statements to Pierpont that he was afraid of retaliation from Carter or Carter’s family, (4) evidence that Carter had access to a .38 caliber Charter Arms, which could have fired the bullet that killed Eva Oleson; (5) evidence that Carter’s wife, Anne, found blood on Carter’s clothes, (6) evidence that Carter told Anne a story about the murder that put him at the scene. *Id.* at 117; and (7) the fact that neither Epifanio nor

Lucia recanted their testimony about Carter's conduct and statements on the night of the murder.

i. State's arguments on the Napue claims

The State argues that even if Watson knew Epifanio's "rape, break, and drive" testimony was false, Watson corrected the testimony at trial. After Epifanio testified that Carter told him he was going to "rape, break, and drive," Watson pushed Epifanio to clarify and to recount only the actual words Carter used. Epifanio then testified that Carter said he was going to "break into a house" because he "needed money." (Tr. Trans. pp. 1129-30).

In the alternative, the State argues Carter presented no evidence that Watson or the 1992 prosecutor knew "rape, break, and drive" was a fabrication. At most, Carter proved that Watson was in a room with Epifanio when the phrase "rape, break, and drive" came up.

The State argues that Carter was not prejudiced by Watson's failure to correct Epifanio's false testimony about only having received fourteen dollars from the police. The State contends that counterfactual evidence would have been offered to explain the false statement, and that this evidence would have hurt Carter more than helped him.

Correcting Epifanio's false testimony about financial benefits would have required Watson to disclose that police had in fact made payments to the Tovars for rent, food, and utilities. If this evidence had been disclosed, then Watson would have presented evidence about the reasons police made the payments. Epifanio told Lieutenant Pierpont he may leave the State. *See* Exhibit F at 78. The police knew that the Tovars were illegal residents subject to deportation and therefore a flight risk. And contrary to his testimony at the evidentiary hearing, Epifanio told police that he was afraid of Carter or that a member of Carter's family might retaliate against him. Police paid the Tovars to mitigate these fears and to ensure that they did not leave Utah before trial.

Similarly, disclosing police payments to Epifanio would have suggested to the jury that Epifanio's testimony was derived from an improper influence or motive. Therefore, the State could and would have called Perla to testify about Epifanio's consistent statements made before any payments were made to him. The State dismisses Carter's contention that no reasonable prosecutor would have called Perla for this purpose. The State argues that Perla's own inconsistent statements could be explained by her fear that she would be held to account for neglecting her children and for helping Carter escape to Wendover. Moreover, even if Perla turned out to be a recalcitrant witness—as she was at the 2021 evidentiary hearing—the State could rebut her claimed lack of memory by confronting her with statements she made to Officer Mack about what Epifanio told her.

Thus, even under the lower *Napue* standard, any correction of Epifanio's false testimony could not have in any "reasonable likelihood" affected the jury's verdict in either the guilt or the penalty phase of the trial. Evidence that the police provided financial assistance to Epifanio would only have led to further evidence of *why* financial aid was provided. It would have painted Carter as someone to be feared. It would not have undermined any of the substantive evidence about the elements of the crime of aggravated murder, especially because the financial assistance was not provided until *after* Epifanio implicated Carter in the crime. In the end, correction of the testimony would have hurt Carter, especially in the penalty phase of the trial. *Cf. Wong v. Belmontes*, 558 U.S. 15, 22 (2009) (rejecting *Strickland* prejudice argument because admitting mitigation evidence counsel allegedly should have presented "would have triggered admission of the powerful [harmful character] evidence in rebuttal. This evidence would have made a difference, but in the wrong direction for [the defendant]" (emphasis added)).

ii. ***State's arguments on the Brady claims***

The State argues that Carter failed to prove by a preponderance of the evidence that the State suppressed any threats made to the Tovars. Epifanio testified there was no quid pro quo—meaning police did not threaten to arrest, deport, or separate him from his family if he did not lie as instructed. And even if Epifanio and Lucia “believed” the State would deport them or incarcerate them, their subjective belief is not evidence that the State had any duty or ability to provide to the defense.

The State points out that Pierpont called immigration, not to deport Epifanio, but rather to ask about placing a “hold” on him. This contact with immigration was disclosed to Carter. Moreover, any threats made during Pierpont’s interrogation of Epifanio were a matter of court record and fully disclosed to Carter.

Similarly, Mack testified that he never threatened the Tovars and was actually very friendly with them. His statement that “as long as they are involved in a murder case[,] no agency would be sending them back to Mexico,” is a promise, not a threat. *Id.* at 193. Moreover, it was Lucia who, unprompted, brought up the issue of deportation.

Finally, Carter’s own attorneys admitted that they never went to the Utah County Attorney’s Office to review the file. Therefore, Carter cannot prove by a preponderance of the evidence what information in the file was disclosed and what information was suppressed by the State.

In the alternative, the State argues that even if threats to arrest, deport, and separate the Tovars were made, those threats were cumulative of other threats disclosed to Carter. At trial, Epifanio testified that his charges were dismissed in exchange for his testimony. Carter knew then that Epifanio had been threatened with arrest and incarceration. Epifanio testified that he and Lucia were illegal residents. And Carter argued that Epifanio should not be believed because

he had been locked up and was desperate to stay in the United States. Finally, the loss of the Tovars' child would have been a collateral consequence of deportation and incarceration.

The State further argues that any threats had no effect on the substance of the Tovars' testimony. Epifanio made consistent statements to Perla prior to any contact with the police—before any threats *could* have been made. At the 2021 evidentiary hearing, Epifanio confirmed the truthfulness of his trial testimony that Carter confessed the murder to him. Lucia's testimony about Carter laughing while demonstrating the crime did not substantively change between her first statement and her testimony at trial. In fact, Lucia's testimony actually became *less* damaging at trial. At the preliminary hearing, she testified that Carter made a shooting motion with his hand, but did not testify to that action at trial.

Thus, while police threats may have been used to impeach the Tovars' trial testimonies, the threats would not have cast doubt on Carter's confession to Epifanio about the murder, or on Lucia's description of what she saw Carter do. In other words, the threats could not and would not have had any material impact on the outcome of either the guilt phase or penalty phase of Carter's trial.

Turning to the issue of coached testimony, the State first argues that Carter has failed to prove Epifanio's testimony was coached. Both Watson and Lieutenant Pierpont testified that the only thing they ever told the Tovars to say during their testimony was the truth.

The State contends that the phrase "rape, break, and drive," is "so syntactically clumsy in English that it strongly suggests a non-English origin." *Id.* at 209. Therefore, the Court should find that the phrase cannot plausibly reflect something the police, prosecutors, or even Carter would say. And when asked about the phrase, Epifanio could not at first remember saying it, and then could not remember who told him to say it.

As to coaching about financial benefits, the State argues that Watson disclosed the rent payments to Carter's lawyer, Duke McNeil ("McNeil) and that he in turn made a strategic decision not to impeach Epifanio about those payments. Had Watson intended to suppress evidence of the rent payments, he would not have put a handwritten note about the payments in a file that was open for defense counsel to inspect. Carter has not presented any evidence, and certainly not a preponderance of the evidence, that the note was not in the file at the time of trial. Indeed, Watson's note was in a box labeled five of eight, suggesting it was part of the case file open to the defense. *Id.* at 206 (citing *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) (finding no *Brady* violation where the evidence was available to the defendant through the government's open file policy)). And just because a prosecutor in 2016 considered the note attorney work product, does not mean that Watson considered it work-product in 1985.

Finally, even if coaching occurred, Lucia's testimony became *less* damaging at trial compared to her testimony at the preliminary hearing. And any coaching of Epifanio would not have damaged his credibility in such a way that the jury would have disregarded the statements Carter made to him. At most, the jury may have believed that Epifanio lied about the money he received, but nothing else – especially because Watson corrected Epifanio's statement about Carter wanting to "rape, break, and drive."

iii. ***State's arguments on the penalty phase***

With regard to the penalty phase of the trial, the State poses the question: "was the Tovar's testimony so important to the jury's decision that undermining the Tovars' testimony would have tipped the scale against Carter's death sentence[?]" Opp. Memo., at 140. The State answers the question no. Carter's own confession established that this was a "night-time home invasion torture-murder with a sexual component." *Id.* at 143. Carter's confession established

that

he entered Eva's house with a gun, demanded money, tied her hands behind her back, stabbed her ten times, left her "moaning" while he searched for valuables, before returning and shooting her in the head. . . . Carter told Pierpont that when he left Eva's house "he felt that she was still alive, that she was gurgling when he left." . . . Carter also told Pierpont that "he thought about raping her but that she was on her period." . . . This is corroborated by the physical evidence, which showed Eva's murdered body with her hands tied behind her back, her pants and pantyhose pulled down to her ankles, and a sanitary napkin at her feet. What's more, Carter confessed to going back to the Tovars' house and telling them what he did, and Epifanio and Lucia testified that Carter predicted about how they will see it on the news. And the jury saw photographs of the scene of the murder, showing Eva's body on the ground, tied up, pants and panty hose pulled down around her ankles, and sanitary napkin removed and left at her feet.

Id. at 143 (internal citations omitted). The medical examiner testified about the violent nature of the knife wounds, how deep and penetrating they were and the force needed to cause Ms. Olson's injuries. The medical examiner also testified about how Ms. Oleson may have still been alive after being stabbed 10 times and before she was shot.

According to the State, all this evidence would have been more compelling and horrifying to the jury in determining a sentence of death than Epifanio's statement of a pre-murder intent to rape or Lucia's testimony about Carter's laughter. Whether Carter intended to rape prior to entering the home or formed that intent after subduing the victim makes very little difference. Indeed, Carter told Lieutenant Pierpont that Ms. Oleson begged Carter not to rape her after Carter pulled her pants down at knifepoint. Carter "sexually degraded" Ms. Oleson in her own home, leaving her in fear of being raped "while she bled out and Carter rummaged through her house." *Id.* at 148.

Furthermore, it is unlikely the jury would have discounted the *entirety* of Epifanio and Lucia's testimony based upon the suppressed evidence. Their testimony about the substantive details of Carter's confession to them remained materially consistent over time. To this day, both

Epifanio and Lucia still stand by their trial testimony about what Carter did and said when he came back to their home on the night of the murder.

Finally, the State concedes that during argument at the 1992 sentencing the prosecutor relied on the phrase “rape, break, and drive” and emphasized Carter’s laughter the night of the murder. However, the jury was instructed that arguments of counsel are not evidence. *Id.* at 158.

For these reasons, the State concludes that “the Tovars’ allegations of prosecutorial coaching, payments, instructions to lie about the assistance, and threats of deportation—even if true and presented to Carter’s resentencing jury—had no reasonable probability of affecting the jury’s judgement at sentencing or undermining confidence in the death sentence.” *Id.* at 161.

c. Carter’s Reply

In response to the State’s argument that disclosure of financial benefits paid to the Tovars would have resulted in the introduction of evidence damaging to the defense, Carter argues that he would have introduced evidence that Epifanio was afraid—not of Carter’s retaliation—but of the police’s threat to arrest and deport him. Carter would have also put on evidence that police themselves, particularly Officer Mack, did not believe the Tovars were in any danger. In addition, the jury would have heard evidence that the police were hiding the financial benefits and coaching witnesses.

This evidence of police misconduct would have called into question material parts of Lieutenant Pierpont’s testimony about Carter’s confession. At the 1992 penalty phase, Lieutenant Pierpont testified that Carter admitted to hearing Ms. Oleson “gurgling” and wanting to rape her. But the only evidence of these details was Lieutenant Pierpont’s testimony. These details were not documented in the written statement Lieutenant Pierpont dictated and Carter signed.

Carter disagrees that Watson adequately corrected Epifanio’s false testimony that Carter said he intended to “rape, break, and drive.” Watson did not ask Epifanio to retract the statement. Watson did not make it clear that “rape, break, and drive” was false. Carter cites to several federal cases for the proposition that a prosecutor must do more than clarify and ask a witness to restate—rather, the prosecutor must affirmatively make clear that the testimony is false. *See United States v. Ramos-Carrillo*, 511 F. App’x. 739, 741 (10th Cir. 2013) (False testimony was corrected when the prosecutor immediately “press[ed] the witness until he confessed his false testimony.”); *see also United States v. Islam*, 796 F. App’x. 343, 344-45 (9th Cir. 2018) (False testimony was corrected when the prosecutor investigated a witness he suspected of testifying falsely, provided an official report of the investigation to the court and defense counsel, and then participated in a bench conference to determine how to “inform the jury and correct the record.”); *People v. Morales*, 112 Cal. App. 4th 1176, 1193, 5 Cal. Rptr. 3d 615 (2003), as modified (Nov. 6, 2006) (False testimony was corrected when the prosecutor fully disclosed that the witness’ testimony was false early in his closing argument. “[I]f the prosecutor discloses fully the falsity of the testimony, there is no due process violation.”); *United States v. LaPage*, 231 F.3d 488, 490 (9th Cir. 2000) (False testimony was not corrected when the prosecutor disclosed that the testimony was false during his rebuttal closing, which prevented defense counsel from contextualizing the importance of the false testimony for the jury.).

Watson never disclosed that “rape, break, and drive” was false. Had Watson done so clearly, the 1992 re-sentencing prosecutor would not have relied on the phrase in seeking the death penalty. It would have been clear to the later tribunal that the evidence was false.

3. Summary of Criminal Trial Record and Evidence Presented at the Evidentiary Hearing

a. 1985 Preliminary Hearing

i. Testimony of Epifanio Tovar

At the preliminary hearing, Epifanio testified that on February 27, 1985, Carter came to Epifanio's home "around seven, 7:30" and left about 10 minutes later. (PH Trans. p. 19). Before leaving, Carter said he was "going to break into a car or steal some money." (PH Trans. p. 20).

Epifanio testified that Carter returned to Epifanio's home two hours later. (PH Trans. pp. 20, 33). Carter announced that "he just killed a woman" by stabbing and shooting her. (PH Trans. p. 20). Carter explained that he knocked on the woman's door. She came to the door and "she looked at him prejudiced-like." (PH Tr. p. 22). This angered Carter so he went inside the house with a gun. The woman retrieved a knife. Carter pointed the gun at her and told her to drop the knife. He then told her to lie on the floor. *Id.* Epifanio testified that Carter said he then took a pillow, placed it on top of the woman's head, and shot her. (PH Tr. p. 22).

Carter lay on Epifanio's living room floor and "showed [Epifanio] how it was done." (PH. Tr. p. 21). When asked to describe the demonstration, Epifanio said "[Carter] laid on the floor and put his hand on the back" and this was done to "show me how he stabbed her, and I don't know." *Id.*

Epifanio testified that a few days later—perhaps at Perla Lacayo's home, although he is uncertain—he saw Carter again. Epifanio had read in the newspaper about the murder of Ms. Oleson. So informed, Epifanio asked Carter "if he had raped the woman." Carter said he did not because she was on her period. (PH Trans. p. 26).

Finally, when asked about whether he had ever seen Carter with a gun, Epifanio said "I seen the gun when he first purchased it." Epifanio did not know when that was because "it's been so long ago." Epifanio testified that the gun was a .38 caliber. (PH Tr. p. 27).

ii. Testimony of Lucia Tovar

Lucia testified that when Carter returned to her home at 9:30 p.m. on February 27, 1985, she was home with Epifanio and their son. Epifanio and Carter were talking and she understood “very little” of the conversation. (PH Trans. pp. 52, 56). According to Lucia, Carter “was talking with her husband for something that [Carter] did.” (PH. Trans. p. 53). Carter was very nervous and Epifanio responded by saying, “You’re crazy.” Carter protested, saying “I’m not crazy.” (PH Trans. p. 53).

Carter lay on the floor and was “giving someone’s hand on the back, and he was just doing something like moving his hand back and forth.” (PH Trans. p. 54). When asked to demonstrate for the Court what she saw Carter doing, Lucia did so explaining that “[Carter] got up where he was sitting and he lay down on the floor. . . . He bent a little bit and he put his hands on the back and he start moving his hand back and forth. He opened his legs and then he just bent more over.” (PH Trans. p. 55). During Lucia’s demonstration at trial, her feet were 1-2 feet apart, she was bent at the waist, and her hands were clasped together. *Id.*

At first, Lucia believed Carter was talking about himself. (PH Trans. pp. 53-54). But on cross examination, Lucia said “He was talking about himself but what [Lucia] thought is that he was talking also of what he did to someone else.” (PH Trans. p. 56).

iii. Testimony of Lieutenant George Pierpont

Lieutenant Pierpont testified that he was a police officer for Provo City. (PH Trans. p. 59). He testified that he interviewed Carter in Nashville, Tennessee on June 12, 1985, for 30-40 minutes. (PH Trans. pp. 59, 69). At the time of the interview, Carter had been in custody for approximately 24 hours, having been arrested by Nashville police officers on the morning of June 11, 1985. (PH Trans. p. 65).

Lieutenant Pierpont testified that Carter gave an oral statement confessing to the murder.

He testified that Carter told him the following:

[Carter] was at the home of Epifanio Tovar on the day of the 27th of February, 1985; that he had left that location to go out and steal some money; that he was eventually seen inside a Volkswagen in the area of 600 East on Third South. Some people scared him away.

He told me 20 minutes later he ended up at the Oleson home. He knocked on the door. Mrs. Oleson came to the front door. At that time he indicated that the phone rang inside the Oleson home. Ms. Oleson left the door open, went to answer the phone, and Mr. Carter walked into the house. As Ms. Oleson returned to the living room area, he then confronted her with a gun, which he says that it was the gun that his wife had purchased approximately a year before; asked her for money, at which time she produced approximately \$20 in various bills. At that point he asked her for more money. She said she didn't have any. He said he did not believe her, at which time she is—he says Mrs. Oleson attempted to flee the home through the east door, east rear door of the home. He stopped her in the kitchen area. Mrs. Oleson saw a butcher knife. It was sitting on the counter. She picked that up. He again pointed the gun at her, ordered her to put the knife down, which she did. He then picks up the knife and ordered her back into a small TV room, which is in the northwest portion of the home. He then indicated to me that he ordered her to take her pants down, which he said she said not to rape her. He told me that he said to her that he wasn't going to rape her, at which time he ordered her on the ground. He told me that he used the telephone cord that was in the room to bind her hands behind her, indicating that she was first laying on her side. He then used the butcher knife to cause a puncture wound to her abdominal area, at which time she rolled over to her stomach. He then indicated he stabbed her multiple times in the back, and she did not appear to die; that she was moaning.

He then left her at that location and went into the living room, where he opened up a couple of drawers looking for more money, couldn't find any, returned to the small television room where the victim was located. She was still alive at that point. He said he then attempted to shoot Mrs. Oleson in the head with his gun. However, he first indicated that the bullets in the cylinder were not lined up properly and the cylinder in the weapon would not turn. He then says he fixed that, picks up a pillow off the couch that was in the room, placed the pillow over the top of the gun, pulled the trigger to the gun. However, the hammer to the revolver hit the pillow and would not discharge. He then says—then he—then lifted the pillow up higher and proceeded to fire one round in the back of Mrs. Oleson's head, and from there he indicated that he left the home through the east rear door.

(PH Trans. pp. 60-62).

Lieutenant Pierpont testified that after giving this oral statement, Carter agreed to give a written statement. Lieutenant Pierpont—not Carter himself—dictated the statement which was then typed. The typed statement was given to Carter who “had the opportunity to read that over, make any corrections or deletions that he wanted to make . . . and then he signed it.” (PH Trans. p. 69).

Finally, Lieutenant Pierpont testified that he was present at the crime scene on February 27, 1985. Police discovered Ms. Oleson’s body in the northwest bedroom of the Oleson home. Her hands had been bound with a white telephone cord. She had been “stabbed eight times to the back and once to the front.” She had been shot in the back of the head. Her slacks were “partially off the body, down near her feet.” (PH Trans. pp. 62-63).

iv. Testimony of Perla Lacayo

Perla Lacayo testified she had known Carter for four years. (PH Trans. p 35). About a month after the murder of Ms. Oleson, Carter told Perla he was a suspect and he gave her a whirlpool bath. *Id.* at 40-41. Eight days later, Perla looked in the bath and saw a gun. *Id.* at 43. Epifanio was with her. *Id.* at 44. On April 9, 1985, she and Epifanio drove Carter to Wendover in her car. *Id.* at 35-36. Carter told her he needed to leave Utah because he had “bitten a lady in her mouth.” *Id.* at 39.

b. 1985 Criminal Trial²

i. Testimony of Epifanio Tovar

Epifanio Tovar testified that on February 27, 1985 Carter came to Epifanio’s home around 8:30 p.m. (Tr. Trans. p 1128). They were outside and some friends were there, but

² The Court has reviewed the entire trial record and makes a summary of the testimony pertinent to Carter’s claims. Testimony from the following witnesses is not summarized here: Martha Kerr, Officer J. Craig Geslison, and Raymond Cooper.

Epifanio could not remember the friends' names. (Tr. Trans. p. 1174). Carter had two beers with him and drank both. *Id.* at 1175. The prosecutor asked Epifanio "what, if anything, did [Carter] tell you he was going to do when he left the first time?" The following exchange then occurred:

Epifanio: He was going to go rape, break and drive.

Prosecutor: And did he tell you that?

Epifanio: Yes.

Prosecutor: What's your best recollection . . . of what [Carter] told you he was going to go do? Tell me what you remember him saying?

Epifanio: That he was going to [go] break in a house.

Prosecutor: And what, if any, purpose did he tell you why he was going to do that.

Epifanio: Needed money.

(Tr. Trans. pp. 1129-30).

Epifanio testified that Carter returned to Epifanio's home around 9:30 or 9:45, claiming that "he had killed a woman" with a knife by stabbing her about eleven times. (Tr. Tr. pp. 1133, 1136, 1173). According to Carter, he went to the woman's home, knocked on the door, and the woman answered. Carter asked for a person, and the woman responded by saying the person did not live there. The woman then "looked at [Carter] differently because of his color, because he was a different individual in the area." (Tr. Trans. p. 1137). This angered Carter and he entered the house. The woman fled to the kitchen where she obtained a knife. Carter pursued and threatened the woman with the gun. Carter told the woman to put the knife down. She responded by throwing the knife to the floor. *Id.* at 1138.

Carter said he stabbed the woman about eleven times. Carter said that "after he had stabbed the woman, he took the gun and he took a nearby pillow. He put the pillow over the gun to muffle the sound. As he fired the gun to [the woman's] head, it misfired. He pulled the gun, it

misfired because the trigger apparently got caught in the pillow, he took the pillow away, took the gun back to the woman's head and fired it and killed her.” (Tr. Trans. pp. 1136-37).

Carter lay on Epifanio's floor and put his hands behind his back to demonstrate “how he had laid her down, and how he had, what he had done to her.” (Tr. Trans. p. 1137). Epifanio testified that when he expressed disbelief about Carter having killed a woman, Carter responded: “Watch the news tonight. You will see me on the news.” (Tr. Trans. p. 1137). Carter stayed for a while, watching the news together with Epifanio, and then left. *Id.*

About a week later, Epifanio saw Carter again in Provo. Epifanio had read in the newspaper about the murder of Ms. Oleson and something about her being raped. (Tr. Trans. p. 1140). Epifanio asked Carter if he had raped Ms. Oleson. *Id.* Carter said that he had not because “she was on the rag” meaning on her period. (Tr. Trans. p. 1141). When asked why he did not go to the police to report what Carter had said, Epifanio testified “I was afraid of what might happen to me and my family.” *Id.*

Epifanio testified that in March 1985 he was at the home of Perla Lacayo. *Id.* at 1143. Perla had a portable whirlpool bath machine. *Id.* Epifanio dismantled the machine and discovered a gun in it. Epifanio left the gun there and re-covered the machine. (Tr. Trans. pp. 1143-44). Around April 8, Carter brought the whirlpool bath machine to Epifanio's home and left it there. *Id.* at 1145. Epifanio was asleep when Carter did this. *Id.* Epifanio testified that the next day he had a conversation with Carter about the gun—although Epifanio could not remember where this conversation occurred. (Tr. Trans. pp. 1146-47). Carter told Epifanio to throw the gun away. *Id.* at 1147. Sometime after this conversation, Epifanio threw the gun in the river “down there near Lake Shore.” (Tr. Trans. p. 1148). Epifanio testified that he told police about him disposing of the gun last week on Saturday. *Id.*

Sometime in early April 1985, Epifanio and Perla drove Carter to Wendover, Nevada in Perla's car. *Id.* When asked why he did this, Epifanio responded, "[Carter] asked me to take him, and so I did." *Id.*

On cross-examination, Epifanio testified that he was from Mexico, and had no legal status in the United States. (Tr. Trans. pp. 1156, 1164). Epifanio testified that he had an eighth grade education and that he was 19 years old on February 27, 1985. Epifanio testified that he worked for Anderson's Roofing and that is how he supported his wife and child.

On cross-examination, Defense counsel placed significant emphasis on Epifanio's recent disclosure that he had thrown the gun in the river at Carter's direction. Epifanio testified that police had "called him in" the Saturday before the trial, and he spoke to Lieutenant Pierpont. *Id.* at 1160. This was either their second or third meeting. *Id.* at 1161. It was in this conversation that Epifanio first said anything about the location of the gun. *Id.* Epifanio conceded that he had been asked about the gun by police and the prosecutor and had in each case told them "he didn't know anything about it . . . and didn't know where the gun is." (Tr. Trans. 1161-63). The following exchange then occurred:

Defense Counsel: Well, were you lying or were you telling the truth there?

Epifanio: I was lying.

Defense Counsel: If I asked you right now as you sit there on the witness stand, how many other lies or how many other stories have you made up in this whole matter, that you could tell us, right in front of all of the Jury?

Epifanio: Just one.

Defense Counsel: Just one lie?

Epifanio: Yes.

(Tr. Trans. p. 1163).

Almost immediately after this exchange, Defense Counsel turned to the question of

monetary payments. On this issue, the following exchange occurred:

Defense Counsel: Mr. Tovar, did you and your family anytime between February and now receive money or support from Mr. Watson's office or from Mr. Pierpont, the police?

Epifanio: Just, we just received fourteen dollars.

Defense: Just fourteen dollars?

Epifanio: Yes, a check from the City.

Defense: Nothing else that they offered you or gave you to stay and be available because you had to be a witness in this case?

Epifanio: No.

Defense: What about your family, your wife?

Epifanio: No.

Defense: You are not on any kind of aid?

Epifanio: No. They just gave us a check, one for each of us, since that last court.

(Tr. Trans. p. 1164).

Defense counsel concluded cross-examination by returning to Epifanio's recent meeting with Lieutenant Pierpont during which Epifanio disclosed for the first time that he had thrown the gun in the river.

Defense Counsel: On Saturday, when you talked with Officer Pierpont about the new story, the gun in the river, how long were you at the police station with Officer Pierpont?

Epifanio: An hour.

Defense Counsel: Were there other officers talking to you at the time?

Epifanio: Yes.

Defense Counsel: Okay. Did they promise you that if you testified or told them something that you would be all right and you wouldn't have any problems?

Epifanio: Right.

Defense: They did tell you to come here and say what you were supposed to say today. Right?

Epifanio: They told me to come here and say the truth.
(Tr. Trans. pp. 1178-79).

On redirect, the prosecutor asked Epifanio “Has myself or anyone from my office or anyone from the police department, Mr. Tovar, ever told you to say anything but the truth?” Epifanio responded, “Just told me to come and say nothing but the truth.” (Tr. Trans. p. 1179).

ii. Testimony of Lucia Tovar

Lucia Tovar testified that she and Epifanio were married and living together on February 27, 1985. *Id.* at 1255. On that night at approximately 9:30 p.m., Carter returned to her home. *Id.* at 1256. She watched as Carter and Epifanio had a conversation, part of which she understood. *Id.* at 1257. She testified that when Carter arrived, he told Epifanio that he (Carter) had done something. Lucia did not understand what he had done. *Id.* at 1257.

Lucia then watched Carter demonstrate as follows: “He laid himself to the floor showing us exactly how he had forced this individual to lay down, and then he put his hands behind his back to illustrate how he had tied her hands behind her back. . . . He demonstrated as if he had done something in this manner to the individual” (witness demonstrating holding up hand with fist clenched and moving it forward and backward). (Tr. Trans. p. 1258). When asked what else Carter did, Lucia answered: “He laughed and laughed about something he had done. And I do not know what it was because he was nervous or why. But he continued to laugh.” (Tr. Trans. p. 1258). Finally, Lucia confirmed that when Epifanio told Carter he was crazy, Carter said: “I swear by my mother that that is true. . . . [W]atch the news.” (Tr. Trans. p. 1259).

On cross-examination, Lucia testified that on February 27, 1985, Carter first came to her home “about 7:30, almost 8:00” in the evening, and that he left after about 15-20 minutes. *Id.* at 1261. He returned “about 9:25, 9:35” around there. (Tr. Trans. p. 1263). When he returned,

Carter and Epifanio sat down on the couch and Lucia sat across from them with her son. Carter asked Lucia, “Do you understand?” Lucia said, “No.” However, she testified that she was “interested and wanted to know.” (Tr. Trans. p. 1265). Lucia testified that she understood “some . . . but not all” of the conversation between Epifanio and Carter. She further testified: “But I was not sure, since he laughed and he seemed to be excited, I wasn’t sure that he had done anything wrong.” (Tr. Trans. p. 1261).

Regarding Carter’s demonstration, Lucia testified: “He was there approximately about 30 minutes, because he kept repeating the same thing over and over again and he demonstrated about twice by laying down on the floor and explaining. And I wasn’t sure that I was understanding what he was saying, but he did demonstrate.” (Tr. Trans. p. 1266). Lucia testified that the television was on during the demonstration and “some type of a movie” or “The Jeffersons” was playing. *Id.* at 1266. When asked if this was what was on television during the demonstration, Lucia testified: “Yes. [Carter] was, during the time that he was there, I wasn’t really watching the television because whenever an announcement came on I could notice [Carter] getting on the ground and demonstrating to my husband and laughing and giggling; and yet I did not understand what he was saying, but I kept thinking to myself he must be crazy.” (Tr. Trans. p. 1267).

Lucia testified that on the day police came looking for Epifanio, she directed them to Epifanio’s workplace. There, she told Epifanio “Tell them whatever it is you know so that they will leave you alone.” (Tr. Trans. p. 1268). She testified that police interviewed her. She testified that Epifanio had never “threatened [her] or . . . pushed [her] into saying anything.” (Tr. Trans. p. 1269).

Finally, Lucia testified that she was aware Epifanio had met with the police the week

before trial started. She testified that she did not recall her husband ever owning or having a gun. However, “one Friday evening, [Carter] came to my house and gave me a box.” (Tr. Trans. p. 1269). She did not know what was in the box. Carter asked her to keep it, and placed the box to the side of her bed. (Tr. Trans. at 1270).

iii. Testimony of Lieutenant George Pierpont

At trial, Lieutenant Pierpont testified again about Carter’s oral confession in Tennessee, but Lieutenant Pierpont added several additional details. These new details included: (1) Carter said that before the murder he attempted to enter a vehicle at the Dean and Peay offices, located at 600 East 300 South, but was “confronted by . . . some men” and fled; (2) Carter said the gun he used “was a gun that he purchased with his wife at a local pawn shop here called Provo Finance;” (3) Carter said he stabbed Ms. Oleson “somewhere between eight to ten times in the back;” (4) Carter said that “he did not feel that Mrs. Oleson had died” from the stab wounds; (5) Carter went to “other areas” (plural) of the home looking for money; (6) Carter said he used the pillow to “muffle the sound of the blast;” (7) Carter said that after leaving the Oleson home through the back door, he “walked up the driveway to the street, proceeded to walk to his home where he says he washed his hands [which] had some blood on them. And from there he walked to his mother’s home, which is located on Third South. She was not home;” (8) Carter said that from his mother’s home, he went back to Epifanio’s home where he “related the same account” of the murder; (9) Carter said he is left-handed. (Tr. Trans. pp. 1185-1188); and (10) Carter said he “thought about” raping Ms. Oleson. (Tr. Trans. p. 1216).

Lieutenant Pierpont provided a new detail about the “mechanism . . . [he] used in order to have [Carter’s] confession reduced to a written statement.” (Tr. Trans. p. 1189). According to Lieutenant Pierpont, Carter had not only been given the opportunity to review the dictated

statement after it had been typed, but Carter had also affirmed its truth every few sentences as Lieutenant Pierpont dictated it. (Tr. Trans. pp. 1189-90; 1210-12).

Lieutenant Pierpont testified that he did not threaten or attempt to coerce or induce Carter's oral or written confession in any manner. (Tr. Trans. pp. 1188-89; 1192). Lieutenant Pierpont denied that he or Nashville police had used the arrest of Carter's female companion, JoAnne Robbins, as leverage to procure Carter's confession. (Tr. Trans. p. 1189, 1199-1204).

But Lieutenant Pierpont conceded that Ms. Robbins had been arrested for either obstruction of justice or harboring a fugitive, and that he interviewed her before speaking with Carter. *Id.* at pp. 1201; 1204. He also admitted that on the morning of June 12, Sergeant Cunningham—the Nashville police officer who had been interrogating Carter the previous day—told Lieutenant Pierpont that Carter was “ready to confess.” (Tr. Trans. p. 1203).

On cross-examination, Lieutenant Pierpont testified that Carter began confessing “almost immediately, within 3-4 minutes” of meeting Lieutenant Pierpont. *Id.* at 1205. In those three to four minutes, all Lieutenant Pierpont did was: (1) advise Carter of his *Miranda* rights; (2) say “Hi Doug, are you ready to go back home?”; and (3) in response to Carter's question “Who are you people?” answered that Lieutenant Pierpont was from the Provo Police Department and was there to extradite Carter back to Utah. (Tr. Trans. pp. 1205-1206). But on redirect, Lieutenant Pierpont testified that during this 3- to 4-minute interval, he also disclosed that he “had talked to several people that [Carter] had made comments to concerning this homicide case,” including Epifanio Tovar, and by that means had “gained a great deal of knowledge of [Carter's] involvement.” (Tr. Trans. pp. 1218-19).

Carter's typed and signed statement was admitted into evidence. On cross-examination,

Lieutenant Pierpont admitted that not everything Carter said to him was memorialized in the typed statement. (Tr. Trans. pp. 1209). When pressed on whether it would have been better for Carter to write out his own statement, Lieutenant Pierpont disagreed stating “That is our department policy to always dictate the statements ourselves.” (Tr. Trans. pp. 1215-1216).

Finally, Lieutenant Pierpont testified about the efforts of Provo police officers to recover the gun from the river the weekend before trial began. He testified that a “team of [five] [scuba]-divers” searched in the river near Lake Shore from noon until 4:30 p.m. (Tr. Trans. pp. 1336-1337). On cross-examination, Lieutenant Pierpont testified that notwithstanding this unsuccessful search, he maintained “a great deal of belief in [Epifanio Tovar’s] credibility” and still believed that “[the gun] is in the river.” (Tr. Trans. pp. 1338-39).

iv. Testimony of Orla Oleson

Mr. Orla Oleson testified that on the night of February 27, 1985, he returned home approximately ten minutes before 9:00 p.m. *Id.* at 1081. He found his wife, Eva Oleson, “laying on the floor, face down, nude from the waist down, her hands tied behind her back with the telephone cord ripped from the wall, a knife from the kitchen laying on the floor next to her, evidence of stab wounds in her back.” *Id.* at 1083.

v. Testimony of Lieutenant Bradley Leatham

Detective Leatham testified that he was called to respond to the Oleson home on February 27, 1985. He observed the body of Ms. Oleson, partially nude from the waist down. *Id.* at 1103. He also observed a knife and pillow. *Id.* at 1106. There were pants near her body. Ms. Oleson’s pantyhose was gathered around her ankles and a sanitary napkin was on the ground to

the left of her feet. *Id.* at 1106-07.

vi. Testimony of Sergeant William Cunningham

Sergeant William Cunningham testified he is a police officer in Nashville, Tennessee. *Id.* at 1219. He assisted in the apprehension of Carter at JoAnne Robins' apartment, and he interviewed Carter prior to Lieutenant Pierpont's arrival. Carter expressed concerns about Robins' welfare. *Id.* at 1239. Robins was eventually arrested and charged with harboring a fugitive. *Id.* at 1237. According to Cunningham, at no time was Carter threatened with prosecution or incarceration if he did not confess, and at no time did Cunningham threaten to incarcerate Robins if Carter did not confess. *Id.* at 1229-30.

Cunningham was in and out of the room while Lieutenant Pierpont interviewed Carter. *Id.* at 1249. He was present while Lieutenant Pierpont interrogated Carter on June 12, 1985. *Id.* at 1233. He affirmed that Carter agreed to everything Lieutenant Pierpont asked the secretary to type when Lieutenant Pierpont was summarizing Carter's statement. *Id.* at 1234.

vii. Testimony of Sharon Schnittker, M.D.

Dr. Schnittker performed the autopsy of Eva Oleson. *Id.* at 1272. Ms. Oleson's back had eight stab wounds, and she was also stabbed in the neck and the abdomen. *Id.* at 1275, 1278. There was a contact gunshot wound to the back of her head. *Id.* at 1275-76, 1278. The gun was no farther than a half an inch away from the skin when it was fired. *Id.* at 1279. A bullet and a copper jacket were found in her skull. Dr. Schnittker testified that the manner of death was homicide, and both the stab wounds and the gunshot wound were fatal. *Id.* at 1281.

viii. Testimony of Officer Richard Mack

During the testimony of Officer Mack, the jury was excused and the parties argued about whether adequate discovery had been provided to the defense. Carter's counsel represented that

the prosecutor told him on two separate occasions that he would make discovery available, but that defense counsel did not receive anything. Watson represented that he told defense counsel that his files were available to be reviewed if defense counsel came to the County Attorney's office. *Id.* at 1303. Watson had no knowledge of defense counsel ever coming to review discovery for the case. *Id.*

After this legal argument concluded, Officer Mack testified that he executed a search warrant on Carter's residence and found .38 caliber bullets. *Id.* at 1305.

ix. Testimony of Edward Peterson

Edward Peterson is a firearms specialist with the Bureau of Alcohol, Tobacco, and Firearms. *Id.* at 1309. He testified that the bullet recovered from Eva Oleson's body was fired either from a .38 special or a .357 Magnum cartridge. *Id.* at 1310. The bullet had similarities to the bullets found in Carter's home. *Id.* at 1315-16.

x. Testimony of Denzil Harvey

Denzil Harvey operates a pawn shop in Provo, Utah, called Provo Finance. *Id.* at 1318. Carter came into the store on August 2, 1984. Carter looked at a .38 gun, but did not purchase it. *Id.* at 1319. He came back with his wife and they looked at the .38 special together. Ann Carter came back a second time and purchased the weapon. *Id.* at 1320-22.

xi. Testimony of Frank Lewis Belgarde, Jr.

Frank Belgard, Jr. runs a hotel desk at the State Line Hotel and Casino in Wendover, Nevada. On April 19, 1985, Carter purchased a bus ticket to Reno, Nevada. *Id.* at 1330-31.

xii. Testimony of Pamela Butler

Pamela Butler observed Carter with a "Spanish guy" and a female at the State Line Hotel and Casino on April 9, 1985. *Id.* at 1332.

xiii. **1985 Verdict and Sentence**

The jury convicted Carter of one count of Murder in the First Degree.³ After the 1985 sentencing trial, the jury concluded that the death penalty should be imposed. The Utah Supreme Court set aside Carter's death sentence in *State v. Carter*, 776 P.2d 886 (Utah 1989).

c. **1992 Sentencing Trial**

A new sentencing trial was held in 1992 at which the following evidence was presented:

i. ***The State's Presentation***

As part of the State's presentation, the State admitted Exhibit 31, which is a transcript of the entire 1985 trial, including the sentencing phase of that trial. The relevant parts of that transcript have already been summarized above except for the testimony of Cameron Forbes, who testified during the penalty phase of the 1985 trial.

Mr. Forbes is the Records Supervisor Officer at the Joliet Correctional Center, which is the main intake center for the Illinois Department of Corrections. Forbes detailed Carter's criminal history, as follows:

- December 22, 1974: Carter was convicted of Burglary to a Dwelling.
- February 7, 1975: Carter received probation for marijuana possession.
- May 17, 1977: Carter was convicted of two counts of Burglary and one violation of probation. He was sentenced to one year, one month, and one day. He served approximately four months.

(1985 Tr. Trans. pp. 1405-07).

In addition to testimony similar to what Dr. Schittker testified to at the 1985 trial, in 1992 Dr. Schittker testified about the "severe force" necessary to cause the stab wound to Eva

³ In 1985, what is now considered Aggravated Murder under section 76-5-202 of the Utah Code was called "Murder in the First Degree."

Oleson's abdomen, and that the wound was from front to back. (1992 Tr. Trans. at 1008-1009). As to the stab wound to Ms. Oleson's neck, Dr. Schittker opined that it was possible the assailant could have been behind her with his arm around the front of her neck when the wound occurred. *Id.* at 1010. With regard to the stab wounds to Ms. Oleson's back, at least seven of the eight wounds would have been fatal without prompt medical attention. *Id.* at 1011. Although the doctor could not say for sure, it was likely the gunshot wound came after the stab wounds. *Id.* at 1019. It is likely the gunshot wound occurred between seconds and up to five or ten minutes after the stab wounds. *Id.* at 1022. Ms. Oleson may have been conscience after the stab wounds, but Dr. Schittker could not say how likely that was. *Id.* at 1023.

In addition to testimony substantially similar to what Bradley Leatham provided at the 1985 trial, Detective Leatham testified that the telephone cord was tied around each of Ms. Oleson's wrists individually. *Id.* at 1036.

In addition to testimony substantially similar to what Orla Oleson testified to at the 1985 trial, Mr. Oleson testified that his wife had a hard-working and graceful character. *Id.* at 1045. She was compassionate and spent time taking care of her neighbors. *Id.* at 1055. She was 57 at the time of her death. *Id.* at 1055. She had four children and was a very loving mother. *Id.* at 1057. Her death has had a traumatic impact on their family, in particular their youngest son. *Id.* at 1065. Ann Carter was Ms. Oleson's Avon lady and had visited their home on several occasions. *Id.* at 1066.

Outside the presence of the jury, defense counsel objected to the admissibility of the phrase "rape, break, and drive." *Id.* at 1095. Defense counsel argued that because the 1985 trial jury did not find the State proved Carter raped or attempted to rape Ms. Oleson, any reference to sexual circumstances of the crime should be excluded. *Id.* at 1096. In response, the prosecutor

argued that both evidence that Carter *intended* to “rape, break, and drive” and that the victim was “on the rag” demonstrate a calloused attitude and an intent to commit an assault. *Id.* at 1099. Evidence that Carter stripped the victim indicates his intent. *Id.* at 1100. According to the prosecutor, all the evidence about Carter’s intent to commit a sexual act goes to the circumstances of the crime. *Id.* The trial court allowed the evidence to show the character of the defendant and his state of mind. *Id.* at 1103. No argument was made that the phrase “rape, break, and drive” was false testimony.

The State read portions of the 1985 trial transcript testimony of Epifanio Tovar into the record, including his testimony that Carter told him he was going to “rape, break, and drive.” *Id.* at 1107, 1110. The State read the testimony of Lucia Tovar into the record. *Id.* at 1120.

In addition to testimony Lieutenant Pierpont offered at the 1985 trial, Lieutenant Pierpont testified that Carter told him that Carter believed Eva Oleson was still alive when he left the home because he could hear her gurgling. *Id.* at 1133.

The parties stipulated to a statement by the medical examiner that there was no evidence that Ms. Oleson was raped or that any sexual contact had taken place. *Id.* at 1140.

ii. Defendant’s Presentation of Evidence

1. Evidence from the 1985 trial transcript

The 1992 sentencing jury had the transcript from the 1985 penalty phase, which included the reports of Dr. Richard B. Spencer and Dr. Lewis. Dr. Spencer’s report is summarized as follows: Mr. Carter has denied any prior mental health problems. He has been examined twice prior to his incarceration by psychiatrists who provided no mental health diagnosis. He has used LSD or heroin daily for the past five years. He does not believe he is addicted and has had no

drug treatment. At the time of the alleged crime, Carter had asked his wife to divorce him and was struggling with racial prejudice at his workplace. Carter has two three-year-old children with different mothers and is trained in auto-body repair, woodworking, and custodial work. Carter maintains his innocence and has normal intelligence. Dr. Spencer concluded Carter does not have any psychiatric disorders or an anti-social personality. (1985 Tr. Trans. at 1411-1415).

The report from Dr. Lewis is summarized as follows: Carter denied any recollection of committing the homicide. Carter attended school in Chicago but dropped out in the eleventh grade. He joined the Job Corps and was sent to Kentucky and Indiana. He committed his first burglary when he was 19. He moved to Provo in 1981 to be with his mother. He married his wife in 1983 and divorced her in 1985. They had one child together. A deputy sheriff at the Utah County Jail opined that Carter is arrogant and did not get along with other prisoners. Carter's wife and sister-in-law did not note any strange behavior from Carter around the time of the homicide. Carter's mother stated that he was moody and quiet. Dr. Lewis administered several psychological tests and found that Carter had borderline intellectual functioning. His IQ score was within the fifth percentile, although other testing indicates that his score is under-estimated. He has no other psychological disorders. He knew the difference between right and wrong and had control of his actions. *Id.* at 1415-1429.

2. Testimony of Willa Lewis

Willa Lewis testified that she is Carter's mother. (1992 Tr. Trans. at 1145). Carter is the youngest of seven children. *Id.* 1146. He was born and raised in Chicago, Illinois. *Id.* In 1992, he was 36 years old. *Id.* Lewis and Carter's father separated when Carter was two or three years old. *Id.* He had no father figure in the home until Lewis remarried when Carter was fourteen. *Id.* Carter's step-father was an alcoholic. *Id.* at 1147.

Carter liked to play ball when he was growing up and interacted a lot with his brothers. *Id.* at 1148. He did not interact well at school. *Id.* at 1149. When Carter was a teenager, they moved from a predominately black neighborhood into a predominately Caucasian neighborhood. *Id.* at 1150. He was spat upon and chased by boys with chains. *Id.* When Carter was a youth, he fell out of a window and hit his head. *Id.* at 1151. When he was an adult, he fell and hit his head on a sink. *Id.* Carter dropped out of school in tenth or eleventh grade. *Id.* at 1152. He started to get in trouble with the law when he was in his early twenties. *Id.* He draws and writes poetry. *Id.* at 1153.

In 1981, the family moved to Utah. *Id.* at 1154. Carter graduated from Provo High. *Id.* at 1155. People made racial slurs toward him when he was at work. *Id.* at 1157. Carter married Anne in 1984. *Id.* at 1158. They had a child, who was adopted by another family. *Id.* at 1159. Carter was very hurt when he signed away his rights to his child. *Id.* at 1159-60.

Lewis speaks to Carter two or three times a month, and she believes he is doing well in prison. *Id.* at 1162-63.

3. Testimony of Jaqueline Stover

Jaqueline Stover is Carter's older sister. Carter was a shy child, and he was friends with kids in the neighborhood. *Id.* at 1166. He liked to dance, he liked music, and he participated in putting on plays that Jaqueline wrote. Carter loved children, and he babysat Jaqueline's children.

When Carter was in Utah, he complained to Jaqueline about racial issues happening at his work. *Id.* at 1168-1169. Carter writes her a lot of letters, and they communicate often. His communication skills have improved since he has been incarcerated. Jaqueline expressed the love she and all her family have for Carter. *Id.* at 1170-71.

4. Testimony of Brad Carter

Brad Carter is Carter's brother, who is only a year and two months older than Carter. *Id.* at 1172. Brad and Carter had the same circle of friends. *Id.* They spent their childhood playing sports, dancing, and going to parties. *Id.* at 1173. Sometime between seven to ten years of age, Carter fell about 15 to twenty feet off a roof. *Id.* at 1193, 1205.

After the family moved to a white neighborhood, Brad, Carter, and their friend Ray were attacked while playing ball. Ray was beaten with bats. *Id.* at 1175-76. Carter was a quiet child. *Id.* at 1178. Carter moved back to their old neighborhood to live with his grandma. *Id.*

Brad joined the Army when he was nineteen, and he remained in contact with Carter. *Id.* at 1180. Brad's and Carter's mutual friend, Steve, was murdered in 1977. *Id.* at 1183-84.

When Carter moved to Utah, he began working at Wright's Furniture, where he met his wife Anne. *Id.* at 1188. When their child was conceived, people would stare at them because African-Americans were an anomaly in Utah. *Id.* at 1190. When the child was born, Anne was trying to decide whether to keep the child or give him up for adoption. *Id.* at 1193-94. Carter became withdrawn, as was his character whenever there was contention. *Id.* at 1194. Carter felt powerless. *Id.*

Brad has had contact with Carter while Carter has been imprisoned. *Id.* at 1203. Carter reads a lot and has gained an understanding of the justice system. *Id.* Brad confessed his love for his brother. *Id.* at 1204.

5. Testimony of Dr. Robert Howell

Dr. Howell is a forensic and clinical psychologist. *Id.* at 1210. He examined Carter in August 1990 and made supplemental investigations in 1991. *Id.* at 1212. He administered IQ tests to Carter, which indicated Carter was in the average to slightly below-average range. *Id.* at

1214-16. These results were 20 points better than results from similar tests administered in 1985. Dr. Howell opined that the reason Carter's score increased so much is because in 1985 he was still feeling the effects of alcohol and drugs. But in 1990, those effects had subsided. *Id.* at 1217. One of the tests he gave to Carter showed indications of brain damage. *Id.* at 1219. Carter's scores improved over time. *Id.*

Dr. Howell found no indications of mental illness or personality disorders. But he did find evidence of organic cerebral dysfunction. *Id.* at 1234.

6. Carter's Statement of Allocution

Carter told the Oleson family and his own family that he was sorry. *Id.* at 1261. He told the jury that although he cannot imagine how the past seven years has been for the Olesons, he has not been very happy in prison. "But it's all I've got." *Id.* at 1261. He then asked the jury to spare his life. *Id.*

iii. References to "rape, break, and drive" during closing argument

The prosecutor made two references to the phrase "rape, break, and drive" in his closing argument. During his initial closing argument, the prosecutor asked the jury to "[c]onsider the intent of the Defendant." *Id.* at 1266. "He said why he was going out that night. He wanted money, he wanted to 'rape, break, and drive.' He wanted to hurt someone. He wanted to get something for himself. He went in there intending to do violence. And then he exposed and brutalized the woman." *Id.*

During rebuttal, the prosecutor argued that the killing was "not in retaliation to [Carter's wife] or anyone else. He decided to go out and 'rape and . . . break and drive.'" *Id.* at 1296.

4. Summary of the Evidentiary Hearing Record⁴

a. Hearing Deposition Testimony of Epifanio Tovar

On the first day of the evidentiary hearing, Carter introduced the transcript and video of Epifanio's deposition. (Exhibits 1, 26). Prior to his deposition, Epifanio spoke with Carter's attorneys and reviewed transcripts from the trial, transcripts from the preliminary hearing, a transcript of his interview with Lieutenant Pierpont, and his April and August declarations from 2011. Exhibit 1, at 46-47.

In his deposition, Epifanio acknowledged providing testimony in 1985 during the trial of Carter for murder. Epifanio testified that Carter had come to his house two times on February 27, 1985. *Id.* at 22-23. He testified that before leaving the house the first time, Carter never said he was going to go "rape, break, and drive." What Carter actually said was that he "was going to break into a car and steal from the car." *Id.* at 25-26. In fact, Carter did not know how to drive and did not have a driver's license. *Id.* at 26. Epifanio admitted that his imputing the "rape, break, and drive" statement to Carter was a lie. *Id.* at 28-29. When asked why he lied about Carter saying this, Epifanio explained "Because that's what they—that's what they wanted me to say." *Id.* at 26. When asked who "they" is, Epifanio responded: "The police department." *Id.* at 27. Upon further inquiry, Epifanio testified that it was either Detective Pierpont or the prosecutor who told him to say "rape, break, and drive." *Id.* at 28. Epifanio testified that before trial he met with Watson to discuss Epifanio's trial testimony. In this meeting, the term "rape, break, and drive" came up. *Id.*

Epifanio admitted that he had lied at trial when he testified to only receiving a \$14 check from the City. *Id.* at 29. In fact, the police "would pay my rent. They would buy me food. They would pay my expenses, my services, like my phone, electricity, and water; gas." *Id.* at 29-30.

⁴ This is a summary of the evidence presented. These are not the Court's "findings of fact," which must be proven by a preponderance of the evidence. *See* Utah Code § 78B-9-105(1). The Court will make necessary findings as appropriate later in this Ruling.

Officer Richard Mack would give Epifanio money and then Epifanio would pay the landlord. *Id.* at 32. Officer Mack paid for Epifanio's phone bill and utilities directly. *Id.* at 32-33. Officer Mack gave Epifanio groceries. *Id.* at 29. He also gave Epifanio a Christmas tree and Christmas presents. *Id.* at 31. Epifanio thanked Officer Mack for the Christmas presents. *Id.* at 32. In Epifanio's view, this must have occurred before trial, because after trial Epifanio never spoke to Officer Mack again. *Id.* at 32.

Epifanio testified that at the time of trial, he was 20 years old and not a legal resident of the United States. When he was arrested, he saw an immigration officer at the Provo Police Department. *Id.* at 33-34. Epifanio's direct examination concluded with this exchange:

Counsel: How did you feel—how did you feel when you testified at trial?

Epifanio: I was scared.

Counsel: And what did you think would happen to you, if you did not lie to the jury about the items you received like the police told you to do?

Epifanio: I thought they would put me in jail and take my son away and deport my wife.

....

Counsel: Why did you lie to the jury when you testified that Doug Carter said he was going to rape, break, and drive?

Epifanio: Because they had told me they would accuse—they would accuse me of being an accomplice, and that they would put me in jail, and that they would deport my wife and that they would take away my son.

Id. at 34-35.

On cross examination, Epifanio affirmed essential elements of his trial testimony. Specifically, Epifanio testified that Carter told him he killed a woman and to watch the news to

confirm that what he was saying was true. *Id.* at 36, 73. Carter lay down on the living room floor and demonstrated how he killed her. *Id.* at 87. He started laughing from the moment he arrived at Epifanio's home because he was nervous. *Id.* at 87-88.

On cross examination, the State's counsel elicited from Epifanio consistent statements he made prior to having been threatened with deportation and prior to having received any money or benefits from the police. These consistent statements included: (1) that on the way home from Wendover after dropping Carter off there, Epifanio and Perla discussed the fact that Carter had confessed to killing a woman, *id.* at 39-42; and (2) Epifanio's post-arrest statements to Lieutenant Pierpont recounting what Carter had said to Epifanio and did at Epifanio's home on the night of the murder, *id.* at 80-88.

On cross examination, Epifanio testified that during his interrogation, Lieutenant Pierpont was trying to get Epifanio to say things that were not true. When asked what specifically, Epifanio responded "such as—such as the rape, break, and drive." *Id.* at 50. In fact, the transcript of the interrogation contains no reference to "rape, break, and drive." (Exhibits F and G).

On cross examination, Epifanio testified that he felt police had treated him as a suspect. For example, during his interrogation, Lieutenant Pierpont suggested Carter had waited in the car while Epifanio and another guy went into Ms. Oleson's home—something Epifanio denied. *Id.* at 53-54. But at the same time, Epifanio conceded that he had "helped [Carter] escape by driving him to Wendover" and "helped Carter by disposing of the gun." *Id.* at 55-56.

On cross examination, Epifanio testified that Officer Mack said the payments from the police were made for "witness protection." However, Epifanio believed that the payments were made to ensure that he did not leave the State. *Id.* at 56. Epifanio testified that he did not fear for

his safety in 1985. When asked if he ever requested not to be under witness protection, Epifanio answered: “I never believed I was in witness protection. I never believed I was. I believe I was actually—I don’t know. I thought they were blaming me for something. . . . because I didn’t think I was a protected witness.” *Id.* at 61-62.

On cross examination, Epifanio testified that he thought it was Lieutenant Pierpont who told him not to say anything about the police paying his rent and other expenses. *Id.* at 57. When pressed about why he lied about the payments, Epifanio answered: “I was afraid and that’s why I lied, because if they didn’t catch the guy, they would arrest me as the murderer.” *Id.* at 58.

On cross examination, Epifanio testified that he believed Watson knew about the payments from police. However, that belief was grounded in Epifanio’s erroneous understanding that Watson was the “boss of the police” and the fact that the police were surveilling Epifanio’s work and home “constantly, day and night.” *Id.* at 61, 63. Epifanio conceded that Watson had never given him any money and had never been present when someone else gave Epifanio money, paid his rent, or gave him anything else. *Id.*

Epifanio conceded that there was never a quid-pro-quo—he was never threatened with arrest, deportation, or the loss of his son if he did not lie about the payments from the police. *Id.* at 57-59. Rather, Epifanio thought police were going to deport him when he was arrested, “but they didn’t because they wanted me to help them.” *Id.* at 58. When asked about police threatening him with the loss of his son, Epifanio testified: “I remember Pierpont threatened me about the case. He said I would end up in jail. My wife would be deported and my son would be taken away, I think by the City.” *Id.* at 59. Later Epifanio testified that Lieutenant Pierpont threatened him with jail, deportation, and the loss of his son “because they wanted me to cooperate with them. They were pressuring me. I don’t know. They were threatening me. I was

very young. . . . [W]hat I recall is that the police they were pressuring me and they were threatening me so that I would wouldn't leave, and they were surveilling me.” *Id.* at 80.

On cross examination, Epifanio testified that when he met with Watson before trial, Watson did not tell him to say anything that was not the truth. *Id.* at 60.

On cross examination, Epifanio testified that his first contact with Lieutenant Pierpont occurred days before his arrest. This contact concerned an unrelated incident involving Carter hitting a woman in the mouth with a two-by-four. Epifanio testified that he did not believe Lieutenant Pierpont threatened him during this contact or discussed the murder. *Id.* at 75-76.

On redirect, Epifanio testified that while there had been no quid-pro-quo—i.e. testify falsely or face arrest, deportation, and loss of your son—Epifanio remained fearful of what would happen if he did not lie about the financial benefits he received as directed by police. Epifanio further testified that he would not have lied had he not been directed by police to do so. *Id.* at 90-91, 100. His fear was grounded in the possibility that he would be charged for obstruction of justice or as an accomplice. *Id.* at 91.

On redirect, Carter's counsel asked Epifanio again why he lied about Carter saying “rape, break, and drive.” Epifanio answered: “Because they pushed me to say that.” *Id.* at 94. When asked if it was difficult to remember exactly how this happened, Epifanio responded: “I don't recall very well. But no, I don't recall that well because of the pressure they were putting on me was a lot. And at the time, they were also telling me they had witnesses against me. That I had been with Doug.” *Id.* Some of this pressure included Lieutenant Pierpont's reference to Epifanio getting the death penalty if he was involved. Asked how that made him feel, Epifanio testified: “That tore me apart in thinking that I would spend my life in jail for something I did not do.” *Id.* at 97.

On redirect, Epifanio conceded that he had told police he was afraid of Carter but testified he had never been threatened by Carter or Carter's family. *Id.* at 95.

On redirect, Epifanio testified that the Christmas tree and gifts from Officer Mack were not for Epifanio's protection, but rather "simply the Christmas spirit." *Id.* at 95-96. Epifanio could not recall whether the tree and gifts were provided to him before or after trial. However, Epifanio did thank Officer Mack for the gifts on the day they were given, and knows that he never spoke to Officer Mack after the trial. *Id.* at 101-102.

b. Testimony of Javier Armenta [hereinafter "Javier"]

Javier and Epifanio went to Jr. High School together and were best friends. Evid. H'rg Trans. 1, Nov. 15, 2021, at 43. He knows Lucia Tovar, Perla, and Carter. *Id.* at 43. One day, Epifanio came into Javier's kitchen and told him he was afraid for himself and for his family because the police had threatened to deport them. *Id.* at 55. Epifanio also told Javier that the police moved him to a new apartment and gave him financial assistance in exchange for him saying what the police wanted Epifanio to say. *Id.* at 56. Epifanio said that all he needed to do was to testify against Doug Carter and the police would leave him alone and continue to provide financial assistance. *Id.* Epifanio was also afraid of being arrested. *Id.* at 57.

Epifanio told Javier that he had helped Carter leave the state. *Id.* at 59. Epifanio was in the country illegally. *Id.* Javier did not know whether Epifanio asked the police for protection. *Id.* at 63.

Javier had spoken to Carter's investigators three times and met with Carter's attorneys prior to his testimony. *Id.* at 67. Javier has not spoken to Epifanio in 30 years. *Id.* at 68.

c. Testimony of Lucia Tovar⁵

On direct examination, Lucia Tovar testified that after she was identified as a witness in the Carter case, she and Epifanio moved apartments twice, each time at the direction of Officer Mack. (Evid. Hr'g. Trans. 2, November 16, 2021, pp. 6-7). She confirmed that Officer Mack provided money to Epifanio for rent, and that Officer Mack paid for utilities (included in rent) and for phone. *Id.* at 7.

Lucia affirmed that “when Christmas was approaching” Officer Mack gave her “\$100, and toys for our children,” but that “after everything was over” she never saw Officer Mack again. *Id.* at 8. Lucia could not remember if the gifts were delivered before or after the trial, only that they were delivered before Christmas. She testified that Officer Mack did not deliver the gifts personally, but that he called on the phone to ask whether she liked what they had brought to her. *Id.* at 60.

Lucia testified that Officer Mack threatened her and Epifanio with arrest, deportation, and loss of their son, and that this occurred three times. *Id.* at 8, 42. The first time Officer Mack made this threat was when he came to Lucia’s house looking for Epifanio to arrest him. *Id.* at 42-43. He made the threat because he wanted to detain Epifanio so that he would talk about what he knew. *Id.* at 44-45. The second time Officer Mack made this threat was after Epifanio was arrested and Lucia asked to see him. *Id.* at 42. The third time Officer Mack made this threat was when he told Lucia “not to say anything regarding the assistance [the police] were giving us.” *Id.* at 12-13, 34, 45, 63. This third threat was made in an office at the courthouse. The occupants of the office were Lucia, Epifanio, Officer Mack and a man sitting behind some furniture. *Id.* at 45-46. Lucia could not remember if this office meeting was before the preliminary hearing or before the trial. *Id.* Finally, Officer Mack may have threatened Lucia with deportation on more

⁵ At the hearing, Lucia testified that in the United States her surname was Tovar, but in Mexico she used the name Lucia Espinoza Perena.

than three occasions—in Lucia’s words he “was always telling things like, oh, they are going to deport you.” *Id.* at 62.

Lucia believed these threats because she was not a legal resident of the United States. She believed that if she did not do what the police told her to do she would be deported. *Id.* at 15. Officer Mack’s threats made Lucia fearful and she expressed that fear to Officer Mack. *Id.* at 61-62. Lucia told no one about the threats. *Id.*

Lucia confirmed that she saw Carter on the floor demonstrating something to Epifanio and that Carter was laughing and giggling. *Id.* at 14-15. However, Lucia testified that she did not know what Carter was demonstrating and that she did not understand anything Carter said to Epifanio. *Id.* at 14-15.

d. Testimony of Officer Richard Mack

Officer Mack was a peace officer with the Provo City Police Department at the time of the Carter murder case in 1985. He spoke Spanish and for that reason was assigned to be the primary contact with the Tovars. Evid. H’rg. Trans. Nov. 16, 2021, at 72. In Officer Mack’s words, “it was my responsibility to make certain that the Tovars were happy.” *Id.* at 75. After the Tovars were identified as witnesses, Officer Mack visited the Tovars “two to three times a week, maybe more.” *Id.* at 121. His objective was to “mak[e] sure that—that they were taken care of to where they didn’t leave town for employment, or—or that they didn’t go back to Mexico or—or—that they were completely watched and taken care of.” *Id.* at 121, 128-29.

As part of that effort, Officer Mack “provided the Tovars with items of financial value.” *Id.* This financial support was given over a period of 8-9 months prior to trial and included money for rent, bills, and groceries. *Id.* at 75. Officer Mack conceded that the police “basically took care of [the Tovars’] daily living expenses” but not 100 percent because Epifanio worked

some too. *Id.* at 76. He remembers giving them cash, but not very often. *Id.* at 128. In Officer Mack's words, his responsibility was to "make sure if [the Tovars] did or did not [need money]" and "if they needed money, we—I took it. . . . If they needed anything, I was there to help them." *Id.* at 128-31.

Officer Mack first opined that the financial support "totaled a couple of a thousand" dollars. *Id.* But he also agreed that an amount of \$400 for the Tovars' rent sounded right. *Id.*

Officer Mack testified that in making these payments to or on behalf of the Tovars he was "just following orders." *Id.* at 81. He testified that he was "sure" Lieutenant Pierpont knew about the payments; and in fact Lieutenant Pierpont told Officer Mack to pay the Tovars' rent. *Id.* at 193. When asked if other people in the police department knew about the payments, Officer Mack testified "Of course. I didn't do it on my own." *Id.* at 81. For this reason, in Officer Mack's view, it was reasonable to assume that prosecutor Watson knew too. Officer Mack emphatically denied ever telling the Tovars not to disclose at trial the payments made to them by police. *Id.* at 144-45; 182, 189. In his view, such coaching was criminal and unnecessary, given the corroborating confession. *Id.* at 145-46.

Officer Mack also arranged for Christmas gifts to be provided to the Tovars. In his deposition, Officer Mack agreed that he "didn't maintain contact with the Tovars after they testified at trial" in mid-December 1985. He further testified that he was certain that all the items of financial value, including the Christmas gifts, were provided to the Tovars between the time of Carter's arrest and the time the Tovars testified at trial. *Id.* at 79-80. In Officer Mack's words, "I am sure that was the case." *Id.* at 79.

At the evidentiary hearing, Officer Mack backtracked from his deposition testimony. At the hearing, he testified that he had contact with the Tovars one or two times after Christmas "in

case of appeals” and that after Christmas Lucia had thanked him for the gifts. *Id.* at 73, 77-78. Officer Mack reached this conclusion because it was his practice to deliver Christmas gifts anonymously to people close to Christmas Day, and in his experience, Christmas Eve is the most important day in Latin culture, so he would have arranged to deliver the gifts close to that day. *Id.* at 78-79, 113-14, 125.

Officer Mack further explained that at the time of his deposition he erroneously believed the Carter trial occurred after Christmas, when in fact the trial ended on December 19, 1985. With the trial date firmly in mind, Officer Mack concluded that he “definitely” delivered the gifts after Epifanio and Lucia testified, respectively on December 13 and 17. *Id.* at 112-14.

Officer Mack testified that he interviewed Lucia Tovar in Spanish on April 12, 1985. The interview was not recorded. Officer Mack summarized the interview in his written report. (Exhibit 10). The interview began with Officer Mack asking Lucia “if she knew anything about Doug Carter’s involvement in the murder of a lady about a month and a half ago.” (Exhibit 10). In this interview, Lucia stated that days before she learned of the murder, Carter came to her home at approximately 10:00 p.m. Carter spoke to Epifanio about something she could not understand. Lucia said “Doug was describing someone else and while doing so Doug put his hands behind his back with the back of the wrists touching together.” *Id.* This was significant to Officer Mack because this was the position in which Mrs. Oleson’s hands had been tied. *Id.* Lucia said that while Carter was speaking to Epifanio, Carter was laughing. *Id.*

Officer Mack conceded that in this initial statement, Lucia said nothing about Carter “moving his fists back and forth as if in a stabbing motion” or demonstrating with a gun. Evid. H’rg. Tran. Nov. 16, 2021, at 90, 198. Officer Mack agreed that if she had said these things, he would have documented it in his report. *Id.* at 91, 198. In August 1985, Officer Mack

“interviewed [Epifanio] once again regarding any possible knowledge he may have about the handgun” used in the murder of Mrs. Oleson. *Id.* at 96. Despite assurance from Officer Mack that Epifanio would not be in trouble if he had done something with the murder weapon, Epifanio was unwavering. *Id.* He reaffirmed that he had seen the gun twice—once after Carter’s wife bought it, and a second time when he saw it in the whirlpool machine at Perla’s home. *Id.* He also said that Carter had never given him the gun to get rid of it. *Id.*

Sometime during his work with the Tovars, Officer Mack learned that both Lucia and Epifanio were not legal residents of the United States. *Id.* at 91, 117, 139. On multiple occasions, Lucia told Officer Mack that she was afraid of being deported. She would talk about “somebody else making threats to them about deporting them.” Lucia could not say the name of this person very well, and though he could not be sure, Officer Mack was “pretty sure she meant Pierpont.” *Id.* at 140. In his deposition, Officer Mack testified that he told Lucia “as long as you’re working with us, [deportation] was not going to happen.” *Id.* at 93.

At the evidentiary hearing, Officer Mack retreated from his deposition testimony. At the hearing, he testified that he told Lucia “as long as [she and Epifanio] are involved in a murder case, . . . no agency would be sending her back to Mexico.” *Id.* at 92. Officer Mack further testified that he could not speak for federal authorities as to why the Tovars were not deported, that he didn’t even know if federal authorities were aware of the Tovars, and that he did not have authority to deport the Tovars. *Id.* at 93, 141.

Officer Mack testified that he never leveraged the Tovars’ fear of deportation to “strong-arm” them into cooperating with police. *Id.* at 140-141. On several occasions, Lucia expressed to Officer Mack her fear that Carter would be released from jail and come after her. Epifanio expressed the same fear of Carter, but with less frequency. These fears increased

shortly before trial. *Id.* at 123-24, 134-35. But Officer Mack confirmed that the Tovars were never in an official witness protection program. *Id.* at 192.

Officer Mack signed a sworn declaration in May 2011. In that declaration, he stated that the Carter murder case was “one of the biggest cases in the history of the Provo Police Department because the victim was the aunt of [] Swen Nielsen, [the] chief of police.” (Exhibit 27, ¶ 15). In Officer Mack’s assessment: “We were all emotionally involved in the case.” Officer Mack expressed concern that Chief Nielsen “was too close to this particular case” and “should have been more at arm’s length.” *Id.*, ¶ 16. Officer Mack stated that Chief Nielsen “gave briefings on the case, made assignments, and was intimately involved.” *Id.* Chief Nielsen spoke at Ms. Oleson’s funeral and said positive things about her husband, Orla Oleson. This concerned Officer Mack because, at the time, Orla Oleson was “the primary suspect.” *Id.*, ¶ 17).

At the evidentiary hearing, Officer Mack backtracked from these sworn statements. He testified that: (1) any pressure on the police was “self-imposed” and did not come from Chief Nielsen; (2) Chief Nielsen did not give briefings to the media or to other police officers, or at least none that Officer Mack could remember in which Chief Nielsen took a major role; (3) Chief Nielsen “assigned the case out and the rest of us did the investigation;” (4) most of the assignments came from Lieutenant Pierpont; (5) he would not go so far as to say that Chief Nielsen was “too involved” and after the first night, Chief Nielsen was not involved in the day to day investigation; and (6) he only had concerns about Chief Nielsen’s involvement a couple of times at the beginning of the case, particularly at the funeral. *Id.* at 69-72, 109-11.

e. Testimony of Lieutenant George Pierpont

Lieutenant Pierpont testified that he was the lead investigator of the major case squad assigned to investigate the murder of Ms. Oleson. Evid. Hr’g. Trans. Nov 18, 2021, at 6. In that

position, he directed the investigation and made assignments to others. *Id.* at 7. He reported to his direct supervisor, Captain Warren Grossgebauer. *Id.*

Either Lieutenant Pierpont or Captain Grossgebauer assigned Officer Mack “to keep track of [the Tovars] and to care for any of their needs that—that they were concerned about.” *Id.* at 36. He was also required to provide extra patrols around the Tovar’s residence. *Id.* at 37. Officer Mack was assigned to this role because the Tovars spoke Spanish and so did he. *Id.* at 36.

Lieutenant Pierpont testified that he does not remember ordering or intending that the Tovars receive any benefits, or whether benefits were actually provided to them. *Id.* at 54, 83. He testified that the police could have paid for the Tovars’ rent and groceries, but that he does not remember whether this happened or not. *Id.* at 84. Similarly, Lieutenant Pierpont could not say one way or the other as to whether he told prosecutor Watson about the Tovars’ rent being paid, but stated either Officer Mack or Captain Grossgebauer could have done so. *Id.* at 89.

Lieutenant Pierpont’s uncertain memory at the hearing about his ordering and the Tovars receiving financial benefits from the police stands in stark contrast to his memory at the time of his deposition. In his deposition, Lieutenant Pierpont was asked “Is it possible that the Tovars were provided with rent?” His answer was an unqualified “No.” *Id.* at 88.

Lieutenant Pierpont testified that “our sole purpose” in assigning Officer Mack to care for the Tovar’s needs was “to protect the Tovars.” Lieutenant Pierpont testified that any payments to the Tovars would have been part of an informal witness protection program—a program not governed by any written policy or directive. *Id.* at 43.

Lieutenant Pierpont testified that cash disbursements to the Tovars for witness protection would have been paid from the “confidential expenditure” budget. This budget was also used for a wide range of purposes unrelated to witness protection, including to buy drugs, pay informants,

rent cars, and purchase meals for informants or crime victims. *Id.* at 43-45. He further testified that any cash disbursement would have been authorized by the Provo City finance department and a receipt issued. *Id.* at 87. This testimony conflicts with Lieutenant Pierpont's deposition testimony. In his deposition, he testified that cash disbursements to the Tovars would not have been documented at all. *Id.* at 85-87. When confronted with this inconsistent statement, Lieutenant Pierpont said that he meant not documented in a police report. *Id.*

Lieutenant Pierpont testified that he interviewed Epifanio Tovar in an interrogation room at the Provo Police Department. The interview occurred on April 12, 1985 and was recorded. Only Epifanio and Lieutenant Pierpont were present. *Id.* at 17-18. Lieutenant Pierpont agreed that he had spoken to Epifanio earlier than April 12, but that conversation had not been about the murder of Mrs. Oleson. *Id.* at 13, 19-20.

Lieutenant Pierpont testified that during the interrogation, he did not "go easy" on Epifanio. He testified that Epifanio knew "what I was going to talk to him about was serious" and "I think that probably my demeanor demonstrated that to him." *Id.* at 23.

Lieutenant Pierpont testified that twelve times during the interrogation, Epifanio expressed that he was fearful of Carter. *Id.* at 29. On cross-examination, counsel asked Pierpont, "You knew [Epifanio] was scared [during the interrogation] right?" *Id.* at 95-96. Lieutenant Pierpont answered "I don't think he feared me. He feared Mr. Carter." When pressed with the question, "You don't think he was scared with being charged with capital murder?" Lieutenant Pierpont doubled-down answering again, "he was afraid of Mr. Carter, not me." *Id.* at 96.

Lieutenant Pierpont falsely represented to Epifanio that Carter had implicated Epifanio in the murder, emphasizing that, if Epifanio was involved, now was his chance to "come on our

side” and that Lieutenant Pierpont “won’t help him after this moment.” *Id.* at 69-70; Exhibit G at 104-05. Lieutenant Pierpont told Epifanio if Carter implicated Epifanio in the murder and said Epifanio “did it,” Epifanio would “get the death penalty.” Exhibit G at 104. Lieutenant Pierpont then falsely stated that Carter had already implicated Epifanio and that police and prosecutorial authorities were wavering about who to believe. Evid. Hr’g. Trans. Nov. 18, 2021, at 104-122.

When asked about his statement that Epifanio would get the death penalty, Lieutenant Pierpont testified that he intended nothing more than to tell Epifanio that this was a death penalty case. Lieutenant Pierpont testified that Epifanio may not have felt pressured by Lieutenant Pierpont’s reference to Epifanio “get[ting] the death penalty.” Citing the death penalty reference, Carter’s counsel asked Lieutenant Pierpont, “And that’s the pressure you applied on him, correct?” Lieutenant Pierpont answered: “Well, you’re—you’re drawing a conclusion. I don’t know that I—that he felt pressure of that. I don’t know that. You’re—you’re—you’re trying to tell me that that’s a pressure thing. It may or may not have been to him.” *Id.* at 105.

In context, the interrogation transcript indicates that Lieutenant Pierpont said Epifanio would “get the death penalty” if Carter “comes back here says, yes, I was there but I stayed out in the car and Epifanio and this other dude went in there and did it.” *Id.* at 104. Then Lieutenant Pierpont falsely told Epifanio that Carter had already made this accusation. Exhibit G at 104-105, 107-109. He went on to say that police and prosecutorial authorities were wavering about who to believe. Evid. Hr’g. Trans. Nov. 18, 2021, at 104; Exhibit G at 115, 122-23. In the end, Lieutenant Pierpont admitted that Epifanio “most likely probably felt pressure.” Evid. Hr’g. Trans. Nov. 18, 2021, at 106. When asked why he lied to Epifanio in the interrogation, Lieutenant Pierpont responded: “I guess—is it a lie? I—I told him that. You classify it as a lie. I

classify it as a form of soliciting information from him.” *Id.* at 131.

In two instances, Lieutenant Pierpont disclosed new facts to Epifanio. In each instance, Epifanio crafted his narrative to conform to the newly disclosed facts. Lieutenant Pierpont asked Epifanio: “Did [Carter] say anything about that he didn’t rape her because she was on her period?” Evid. Hr’g. Trans. Nov. 18, 2021, at 132; Exhibit F at 49. This was the first disclosure that Ms. Oleson was menstruating. Epifanio responded to this new information, answering: “Oh, yeah, yeah. Yeah. I just remembered. He said he pulled her pants down, and he said she was on the rag or something. That’s what I—on the rag.” Evid. Hr’g. Trans., Nov. 18, 2021, at 132-33; Exhibit F at 49.

When asked if Carter admitted to knowing the victim, Epifanio answered: “He did not know her.” Evid. Hr’g. Trans. Nov. 18, 2021, at 130. Lieutenant Pierpont then asked, “He’d never been there before?” Epifanio answered, “No.” *Id.* Lieutenant Pierpont then made the following misrepresentation: “[Carter] told me that he had [been there before].” Taking this cue, Epifanio said: “He told you he had? . . . Wait a minute. Now he told me that. I don’t know if it’s—but if it’s the same lady, he told me that she was the Avon lady because his wife sells Avon, and she was an Avon lady, and I don’t know if he knew her because . . . he used to go out with his wife selling Avon.” *Id.* at 130-31.

During the interrogation, Lieutenant Pierpont repeatedly pressed Epifanio on whether Carter said he was going to rape the victim. On this question, Epifanio stood firm—consistently denying that Carter ever said he was going to rape the victim. *Id.* at 133-40. At most Epifanio was led to speculate “I guess he was going to rape her.” But when pressed further, Epifanio stated “I don’t remember [Carter] telling me that he was going to rape her.” *Id.* at 138, 140. Pierpont pressed on asking “But he certainly let you—did he give you an impression that if she

hadn't been [on her period] [Carter] would have raped her?" But again, Epifanio responded "No, he didn't give me any." *Id.* at 140.

Pierpont pressed further asking "I mean, he took her pants down for a reason." *Id.* Epifanio then speculates: "Yeah, because I guess he wanted to rape her because he, you know, would say that he's never going to turn down a woman, you know, like if I get it, you know, I'll take it. . . . So I think he might have. He would have raped her." *Id.*

Even though Carter never told Epifanio that Carter was "going to rape" Mrs. Oleson, Lieutenant Pierpont (1) attempted (albeit unsuccessfully) to insert that very admission into the statement he dictated on behalf of Epifanio during the interrogation; and (2) prepared a police report which reads: "[Carter] also told [Epifanio] that [Carter] was going to rape Mrs. Oleson but after he got her pants down he saw that she was having her period therefore he did not have any sexual contact with her." (Exhibit 15, p. 2).

Lieutenant Pierpont testified that three days before trial began either he or Officer Mack brought Epifanio in to question him about the gun. *Id.* at 106, 111-12. At that time, Epifanio "changed his story about the gun" disclosing for the first time that at Carter's direction he threw the gun in the river near Lake Shore. *Id.* at 111. Lieutenant Pierpont agreed that the gun was a very important part of the case and that both the police and the prosecutor wanted to find it. *Id.* at 106. Lieutenant Pierpont assumed that Epifanio's new statement about throwing away the gun would be documented in a police report, and was not aware that no such police report existed. *Id.* at 111-12.

Lieutenant Pierpont testified that it was not his purpose to harass or intimidate the Tovars by use of extra patrols or by making regular contact with them through Officer Mack. *Id.* at 49-

50. He further testified that he never threatened or made any promises to the Tovars, except for the promise to protect them. *Id.* at 67.

On direct examination, Lieutenant Pierpont denied threatening Epifanio with immigration-related consequences before or during Lieutenant Pierpont's interrogation of Epifanio. *Id.* at 33. Counsel then asked whether Lieutenant Pierpont had made such threats to Epifanio during the period after the interrogation on April 12, 1985, through the time of trial in December 1985. Lieutenant Pierpont answered this question with a question: "Directly to him?" Counsel for the State answered. "Yes." Lieutenant Pierpont then answered "No." *Id.* at 33.

Sometime during the three days following his interrogation with Epifanio on April 12, 1985, Lieutenant Pierpont learned that Epifanio was not a legal resident of the United States. On April 15, Lieutenant Pierpont contacted Investigator Paul James with the immigration department and asked whether an immigration hold could be placed on Epifanio. *Id.* at 92-93; Exhibit 16.

Investigator James explained that if a hold were placed on Epifanio, he could only be held in Utah for two or three days before being shipped to California and deported to Mexico. But Investigator James expressed willingness to "assist the police department in any way concerning [the Carter] investigation" and invited Lieutenant Pierpont to contact immigration authorities if needed. Evid. Hr'g. Tran. Nov. 18, 2021, at 93; Exhibit 16.

Lieutenant Pierpont denied ever telling Epifanio and Lucia to "lie about anything." *Id.* at 67. He denied telling the Tovars to say anything specific when they were called to testify. *Id.* He denied telling the Tovars to "deny receiving benefits from the police or anybody else if they were ever asked about it [at trial]." *Id.* Finally, as to the phrase "rape, break, and drive," Lieutenant Pierpont denied ever hearing the phrase before Epifanio said it at trial. *Id.* at 56.

Lieutenant Pierpont denied “giving” this phrase to Epifanio. *Id.*

Lieutenant Pierpont testified that on April 10, 1985, he and Officer Mock (an officer different from Officer Mack) conducted a stakeout of Perla Lacayo’s apartment. The stakeout lasted from 9:00 a.m. to 1:30 p.m. *Id.* at 115-16, 122. During this time, Officer Mock approached the apartment and discovered Perla’s three minor children unsupervised. The oldest child was nine. *Id.* at 58, 116-17. Lieutenant Pierpont called DCFS to take custody of the children. *Id.* at 59. Twenty minutes after Lieutenant Pierpont called DCFS, Perla arrived home and was detained. DCFS workers arrived shortly after Perla did. Perla was having difficulty communicating in English. *Id.* at 56. So Lieutenant Pierpont called Officer Mack to the scene because he spoke Spanish. *Id.* Perla was “pretty upset” and crying when Officer Mack arrived. *Id.* at 60-61, 121. A conversation ensued between the officers, the DCFS workers, and Perla. *Id.* at 118. After Officer Mack arrived and Perla was able to communicate with a Spanish speaker, she calmed down. *Id.* at 60-61. Her children were not removed from the home by the DCFS workers. *Id.* at 60. Perla was transported to the police department where Officer Mack interviewed her. *Id.* at 120.

Lieutenant Pierpont testified that calling DCFS workers to care for unattended minors was normal procedure. *Id.* at 59. He testified that in calling DCFS it was not his intent to “improve [his] bargaining position, so to speak” with Perla or to punish, threaten, or intimidate her. *Id.* at 59-60. Lieutenant Pierpont testified that he first learned Perla was not a legal resident of the United States “right about the same time” he spoke with her on April 10, but not before. *Id.* at 66, 124. Lieutenant Pierpont testified that he never threatened Perla. *Id.* at 67.

f. Testimony of Perla Bermudez (Lacayo)

Before summarizing Perla’s testimony at the hearing, the Court notes that the purpose of her hearing testimony was narrow. During the 1985 trial, the State chose not to call Perla as a witness. The State made this choice even though defense counsel had suggested to the jury that Epifanio had a motive to fabricate (i.e. to avoid deportation from the United States). The State could have called Perla to rebut this suggestion. She might have testified about consistent statements made to her by Epifanio before any motive to fabricate arose. But the State elected not to introduce these statements through Perla.

At the hearing, the State called Perla to present counter-factual evidence—meaning evidence the State would have offered at the time of trial if the alleged *Brady* and *Napue* violations had not occurred. More specifically, the State called Perla to testify that: (1) Epifanio made statements to Perla about what Carter told him which were consistent with Epifanio’s trial testimony; and (2) those consistent statements pre-dated any payments made to Epifanio by the Provo City Police Department, and any threats made by police to arrest, deport, and separate the Tovars from each other and their child.

Perla testified that Epifanio told her what Carter had said to him about the murder on two occasions. The first occurred in mid-March 1985, approximately one month before her April 10 interview with Officer Mack. At that time, she went to visit Epifanio. During the visit, Epifanio told Perla “I need to talk to you. I need to tell you something very important and it’s bad.” Evid. Hr’g. Tran. Nov. 17, 2021, at 150-51. Initially reluctant to disclose, Epifanio elicited from Perla a promise not to tell. He then told Perla that Carter had confessed to being “involved in the murder of that lady—that he had done it.” *Id.* at 151. Epifanio told Perla that he did not know if he would tell the police because he was afraid. He asked, “Who is going to protect me. In case

something happens to me, or my wife, or my son?” *Id.* at 153. However, he did not say who it was he feared.

The second time Epifanio told Perla what Carter had said to him about the murder occurred on or about April 9, 1985. On that date, Perla and Epifanio drove Carter to Wendover. *Id.* at 84. After dropping Carter off in Wendover, Epifanio and Perla drove home together. On the way back home, Epifanio for the second time told Perla that Carter had confessed to killing a lady and this was the “real reason” Carter was leaving Utah. *Id.* at 112-13, 116-17, 121. It was during this drive back to Utah that Epifanio made the following pre-motive statements to Perla:

- On February 27, 1985, Carter was at Epifanio’s home and had the gun with him. *Id.* at 113.
- Carter said he wanted money and was going to go steal. *Id.* at 114-15, 136-37. On cross-examination, Perla agreed that when asked by police what Carter had said he was going to steal, she had answered: “I don’t know. I think he told [Epifanio] that he had broken into a car.” *Id.* at 157.
- Carter left Epifanio’s home around 8:00 or 8:30 p.m. *Id.* at 115.
- Carter returned and told Epifanio what he had done; when Epifanio expressed disbelief, Carter said “Well, you are going to hear it on the news.” *Id.* at 115-16, 125.
- Specifically, Carter told Epifanio that Carter “went to the lady’s house. He knocked on the door. The lady opened the door, and he said that he was looking for someone, that’s what Doug told the lady. . . . He told the lady to lie down to the ground and he pulled her pants down. And that he then told the lady to get like that face down, and that she grabbed the—the lady grabbed the knife. So then he told the lady to let go of the knife, and then he put the gun on her. Doug told the lady to throw aside the knife. So then he

said that the lady left the knife. . . . She left it. And then . . . he told the lady to lay down on the ground and then he stabbed her like this. . . . In the back. And since he saw that the lady wasn't dying, he put the pillow on the lady and he shot her. [A pillow over the head] so that the—all the racket couldn't be heard from the gun. That's why he said he put the pillow and shot her." *Id.* at 122-25, 131-35, 140-42.

- Epifanio said Carter admitted to stabbing the lady eight times. *Id.* at 133-34.
- Epifanio did not witness the murder; his knowledge came "by word of mouth from Doug" and because Doug is a liar Epifanio did not believe him. *Id.* at 117.
- Epifanio wanted to tell the police what Carter had said, but was reluctant to be involved out of fear that Carter or his family "might do something against . . . my son and my wife." *Id.* at 117, 127-28, 140.
- Epifanio was afraid to tell the police what he knew because they would send him to prison. *Id.* at 128. Epifanio was "afraid because he doesn't want to be involved in anything." *Id.* at 117-18.

On cross-examination, Perla admitted that she first told police Epifanio "doesn't know anything" about the gun or Carter being a suspect in the murder. *Id.* at 156.

Perla testified that at the time police came to her home, she was not a legal resident but was in the process of securing a green card. *Id.* at 163. She testified that Officer Mack had threatened her with deportation and the loss of her children. *Id.* at 163, 167. She testified that after DCFS workers were called to her home, police told her if she did not cooperate "they would take [my] child away." *Id.* Perla testified that her signed written statement was in English and she did not know what she was signing. *Id.* at 166.

Perla testified that since 2006, she has maintained contact with Carter, exchanging letters

with him, speaking to him on the phone, and putting money on his commissary account. The last time she donated money to the commissary account was about two years ago. Her most recent telephone conversation with Carter occurred just two weeks before her testimony at the hearing. *Id.* at 73-74, 158.

At the hearing, Perla gave the answer “I don’t remember” more than one hundred times. Perla claimed not to remember events both recent and distant in time. *Id.* at 160-61. (Hearing Tr. pp. 160-61). For example, Perla claimed not to remember (1) the last time she wrote to Carter; (2) the last time Carter wrote to her; (3) the last time she donated money to Carter’s commissary account at the prison; and (4) whether she was served with a subpoena to appear at the hearing on October 30. *Id.* at 73, 160.

When pressed about the reasons for her lack of memory, Perla testified she currently suffers from and takes medication for anxiety, panic attacks, and depression. These conditions have persisted for a long time, exacerbated by her experiences during the Carter murder case.

Perla testified that she was “really scared” when interviewed by police. When asked whether she felt she had experienced trauma related to the Carter case, Perla articulated one deep-seeded memory:

The trauma that I have, and I will always never forget, is—is when they—the police came into my house with the gun looking for Douglas, and the intimidation they’re going to take my kids away. So I feel intimidated, and I got that trauma, and that’s always have it in my mind.

Id. at 164. . Perla testified that this trauma does affect her memory, but only “a little bit.” *Id.* at 164-65.

g. Testimony of Prosecutor Wayne Watson

The parties took Watson’s deposition during discovery in this case. Between the time of his deposition and the hearing, Watson died. His deposition testimony was admitted into

evidence. (Exhibit 4).

Watson was the lead prosecutor in both the guilt and sentencing phases of the 1985 Carter murder trial. *Id.* at 8.

Watson testified that at the time of the trial he did not know that the Tovars were illegal residents of the United States. *Id.* at 9. At first, Watson had no memory of the Tovars and did not think he called them as witnesses. *Id.* at 10. After learning that in fact both Epifanio and Lucia were witnesses called by the State at trial, Watson testified that the State had not relied heavily on the Tovars' incriminating testimony. Watson testified that he "didn't even need [the Tovars]" and "might have thrown them in for extra source." *Id.* at 10-12.

Watson testified that Provo City paid the Tovars' rent "for a month or two." Watson knew about these payments because Lieutenant Pierpont told him about them. *Id.* at 31-32. Watson conceded that rent, utility, and cash payments made by the Provo police department for the Tovars should have been disclosed to defense counsel because the payments could have been used to impeach the Tovars. *Id.* at 35-39. Watson testified that "this stuff, the rent issue, this piece of paper, every one of them was talked to McNeill about." *Id.* at 39.

In Watson's view, he had no duty to correct Epifanio's false testimony about receiving only a \$14 witness fee because (1) Watson did not know the exact amount that Provo police had paid for the Tovars' rent; and (2) Watson "probably would assume [the correction] is coming later" from defense counsel. *Id.* at 37-41.

Attached to Watson's deposition is Exhibit 3 which includes a copy of a page from a yellow legal pad. On that page, there appears a hand-written note which reads: "Epifanio / \$ only deposit on apartment / deposit on phone." When asked about this note, Watson conceded that the handwriting was his own. Exhibit 4 at 55-56. He then testified that the Tovars must have

received these deposits, not the rent payments as he had first stated. *Id.* at 55-56. According to Watson, if Provo City was going to get the deposits back, then the money was not actually given to the Tovars. *Id.* at 56-57.

Watson testified that he did not ever give direction to law enforcement to “keep[] tabs on witnesses.” *Id.* at 42. Watson agreed that because the Tovars could have been deported, Mack would have checked in on them once or twice a week. *Id.* at 48.

Watson disagreed with the idea that the Carter case was one of the biggest cases in the Provo Police Department. He disagreed that the police department was emotionally involved due to the victim’s relation to the police chief. *Id.* at 48-49.

Watson indicated that based upon statements made by Anne Carter, Lieutenant Pierpont believed that three people went into Ms. Oleson’s home the night of the murder. *Id.* at 51. Watson was prepared to charge anybody who went into the Oleson home, even if it was Epifanio. *Id.* at 51-52. But they never found any evidence that Epifanio was involved in the actual murder. *Id.* at 52.

Watson testified that—with the exceptions of children or elderly witnesses—the only thing he did to prepare witnesses for trial was to instruct them to tell the truth. *Id.* at 52-53. Watson believed that law enforcement did not ever go over testimony with witnesses. *Id.* at 53.

The only testimony Watson remembers the Tovars providing is that Carter came to their house and told them to watch the news. *Id.* at 54-55.

Watson testified that a hearsay statement from a Ms. Dahlquist that “Orla Oleson would kill Eva [Oleson]” would not have been something defense counsel would have investigated as potentially useful. *Id.* at 14-17.

When asked whether it was possible, even with an open file policy, for *Brady* material

(like Anne Carter's immunity agreement) to "slip through the cracks," Watson answered: "No. Anything's possible, but not in the death penalty cases and not in [the] Utah County attorney's office." *Id.* at 30-31, 73.

Watson was asked whether evidence that a defendant laughed when retelling how he committed murder would be "a powerful fact to use in obtaining a death sentence?" *Id.* at 61-62. Watson equivocated, but ultimately answered: "not in my book." *Id.*

When asked, Watson denied that a defendant's low IQ . . . that borders on intellectual disability, what we used to call mental retardation, might have an effect on how a jury views a confession" by the defendant. *Id.* at 67. (Watson Depos. p. 67).

If a doctor hired by the government told him a defendant was incompetent, Watson would not tell the defense, but would put the communication in the file for the defense to review. *Id.* at 71-71. "It all goes in the file." *Id.* at 72.

Watson testified that Carter's investigators were "very adept at putting words in these people's mouths" and stating that this was "obvious when you read this crap." *Id.* at 60. Watson stated to Carter's counsel: "Shame on you." *Id.* at 60.

When asked whether the mention of rape would be a powerful fact in a criminal case, Watson responded, "I think it's a powerful fact in this case because it's an element of the death penalty." *Id.* at 62.

When asked whether the mention of rape or attempted rape would have a great impact on the jury, Watson stated that he "had solid evidence to present the rape charge," recited the facts he observed at the crime scene, defended his decision to seek the death penalty, and concluded with the summary declaration: "And I filed the death penalty charge, and I pursued it, and we were successful doing it." *Id.* at 62-64.

Watson offered a diatribe against the Supreme Court and former Supreme Court Justice Christine Durham. He said: “I tell you, the Supreme Court ought to stick to what they know and not what they are guessing. Justice Durham was the worst of the bunch, to put on her prosecutor’s hat and came in and told us what we should be doing in every case that I ever read by her.” *Id.* at 74.

During the deposition, Watson would interrupt questioning with asides to counsel for the State. When pressed on issues he deemed improper subjects of inquiry, he (1) told counsel for the State: “You are not going to whisper to me, send me notes, nothing? Not even shut up?” *id.* at 68; (2) told counsel for the State: “Object to that. Will you please?” and then refused to answer on the basis of the objection he elicited, *id.* at 74-75; (3) told defense counsel: “And you think [my alleged contact with the police officer who arrested me for DUI] is relevant to the honesty and truthfulness of my deposition here today? . . . I’m not going to answer any more questions. They are all bunk, and especially when you pull this crap out of the file,” *id.* at 78.

One of the questions Watson refused to answer was whether he had ever been disciplined by the Utah State Bar. *Id.* at 75. Carter attached Exhibit 14, a Stipulation and Order signed by Judge Eyre that indicated Watson was suspended from the practice of law for nine months. Watson initially refused to answer whether he had ever been arrested for a DUI, but later denied the incident ever happened. *Id.* at 77-78.

h. Testimony of Paul Jones

Paul Jones is a deputy attorney employed in the civil division of the Utah County Attorney’s Office. Evid. Hr’g. Trans. 3, Nov. 17, 2021, at 4-5. In response to a subpoena, Jones provided a handwritten note to Carter’s counsel in October 2016. *Id.* at 6. The note read: “Epiphany \$ only deposit on apartment, deposit on phone.” *Id.* at 6, Petitioner’s Exhibit 3. Jones

found the note among the Utah County Attorney records on the Carter case. *Id.* at 6-7. The note was stapled to four other pages, which were disclosed on September 20, 2021. *Id.* at 8-9. The other four pages were not disclosed in 2016 because Jones determined they were work product. *Id.* at 18. All five stapled pages were in a box of what appeared to be attorney notes. *Id.* at 13-14. The box was labeled as number five, and there were eight total boxes pertaining to the Carter case. *Id.* at 13-14, 17.

i. Testimony of Bradley Rich

Bradley Rich is an attorney who represented Carter along with Jack Morgan in Carter's first post-conviction relief case. *Id.* at 21. The theory for Carter's post-conviction case was that the Tovars were compensated for their testimony and threatened with deportation and prosecution. *Id.* at 22. Counsel searched for the Tovars but could not locate them. *Id.* at 23. Rich familiarized himself with Carter's file and found no evidence that the Tovars were paid any money other than a \$14.00 check or that they were threatened with deportation or the loss of their child. *Id.* at 26.

Had Rich seen the note admitted as Exhibit 3, he would have conducted further investigation and raised a claim of suppression of evidence. *Id.* at 27-28.

Rich knows Wayne Watson and believes Watson has a reputation for being an honest person. *Id.* at 29.

j. Testimony of Gary Weight

Gary Weight is a retired public defender who would have represented Carter had Carter not hired private counsel. *Id.* at 39-40. Weight assisted Carter's private counsel, Duke McNeil, during Carter's trial by lending him office space, materials, and assistance if needed. *Id.* at 39-40. Weight and his firm handled Carter's appeal. *Id.* at 42. Weight reviewed Carter's file and

found no evidence that the Tovars received any financial assistance from the government. *Id.* at 42. He also found no evidence the Tovars had been threatened with deportation or the loss of their child. *Id.* at 42. Had Weight seen the handwritten note identified as part of Exhibit 3, he would have inquired further about what it meant. *Id.* at 43.

Weight was aware that the Utah County Attorney's Office had an open file policy at the time of Carter's trial. *Id.* at 46.

k. Testimony of Michael Esplin

Michael Esplin is a retired attorney in the State of Utah who spent a considerable amount of his career working as a public defender in Utah County. He worked on a number of cases with Wayne Watson. *Id.* at 52-53. When asked about Watson's reputation for truthfulness, Esplin replied, "It's not good. It's a bad reputation. You can't – could not trust him." *Id.* at 53.

Esplin and his firm were appointed as local counsel to assist Duke McNeill on the Carter case. *Id.* at 54. He was unaware of any payments made to the Tovars besides a \$14.00 witness fee, and he was unaware of whether the Tovars were threatened with deportation and the loss of their child. *Id.* at 56. Had he seen the note admitted as part of Exhibit 3, he would have sought to introduce it as evidence and challenged the veracity of testimony at trial. *Id.* at 56-57.

Esplin was aware that the Utah County Attorney's Office had an open-file policy, but he believed the policy to be a fallacy. *Id.* at 62. According to Esplin, the County Attorney's office often marked documents as work product that were actually discoverable. *Id.* at 62.

5. Findings of Fact⁶

Pursuant to the PCRA, Petitioner has the burden of proving the facts necessary for relief by a preponderance of the evidence. *See* Utah Code § 78B-9-105(1). "The court may not grant

⁶These judicial findings of fact are based on evidence presented in this civil action for post-conviction relief. If a new criminal trial is held, the jury will be tasked with making its own independent findings about the credibility of witness, the facts of the case, the guilt or innocence of Carter, and if necessary, what penalty should be imposed.

relief without determining that Petitioner is entitled to relief . . . in light of the entire record, including the record from the criminal case under review. Utah Code § 78B-9-105(1)(a).

Having considered the entire record, including the record from the criminal case under review, the Court finds by a preponderance of the evidence the following facts:

a. Credibility of Key Witnesses

In this case, the Court must resolve disputed issues of material fact. These disputed facts include: (1) Whether the police paid financial benefits to the Tovars and in what amounts?; (2) Whether police threatened the Tovars with arrest, deportation, and separation from each other and their son?; (3) Whether the police or prosecutor coached Epifanio to give false testimony at trial about financial benefits paid to him or on his behalf?; and (4) Whether the police or prosecutor coached Epifanio to give false trial testimony about Carter saying he was going to “rape, break, and drive” before the murder?

Resolving these disputed facts requires the Court to assess the credibility of key witnesses. To that end, the Court finds as follows:

Credibility of Lieutenant Pierpont

The Court finds that Lieutenant Pierpont was not a credible witness. The Court makes this finding for the following reasons:

- In his deposition, Lieutenant Pierpont was asked “Is it possible that the Tovars were provided with rent?” His answer was an unqualified “No.” But between his deposition and the evidentiary hearing, Lieutenant Pierpont was provided with a copy of Officer Mack’s deposition testimony. There, Officer Mack testified that he had paid the Tovars’ rent and other expenses at the direction of Lieutenant Pierpont. Faced with this inconsistent evidence, Lieutenant Pierpont at the evidentiary hearing claimed for the first

time not to remember whether financial benefits had been paid to the Tovars. Evid. Hr'g. Trans. pp. 87-88.

- Lieutenant Pierpont testified that “our sole purpose” in assigning Officer Mack to care for the Tovars’ needs was to “protect the Tovars.” He further testified that any payments to the Tovars would have been part of an informal witness protection program. Evid. Hr'g. Trans. Nov. 18, 2021, at 43. But the evidence demonstrated this explanation of the payments to be a recent fabrication. The Court makes this finding because:
 - Lieutenant Pierpont conceded that the “witness protection” program was not established by any written policy or directive. *Id.*
 - Lieutenant Pierpont testified that cash disbursements to the Tovars for witness protection would have been paid from the “confidential expenditure” budget. But he conceded that this budget was also used to fund a wide range of purposes unrelated to witness protection, including to buy drugs, pay informants, rent cars, and purchase meals for informants or crime victims. *Id.* at 43-45.
 - Lieutenant Pierpont testified that any cash disbursement to the Tovars would have been authorized by the Provo City finance department and a receipt issued. *Id.* at 87. But this testimony is inconsistent with what Lieutenant Pierpont first said in his deposition. There, he testified that cash disbursements to the Tovars would not be documented at all. Lieutenant Pierpont’s later explanation that what he meant was “not be documented in a police report” is an unpersuasive after-thought.
 - Lieutenant Pierpont could recall only one other instance in which payments had been made to a trial witness. In 1982, Duane and Harley Willett committed a

homicide in Utah County. The police paid for a witness to travel from New York to Utah for the preliminary hearing and trial. While the witness was in Utah to testify, the police paid the witness's room and board. The police provided armed protection for the witness going to and from the courthouse. Later, the witness was relocated to a different State, although there is no evidence that police incurred the cost of relocation. These one-time payments for travel, accommodation, and protection of an out-of-state witness stand in sharp contrast to the police paying routine living expenses to the Tovars over a period of 8-9 months.

- Lieutenant Pierpont's unwillingness to concede the obvious damaged his credibility. The best examples of this come from Lieutenant Pierpont's testimony about his interrogation of Epifanio. Lieutenant Pierpont testified that (1) Epifanio feared Carter, not me; (2) Epifanio was not afraid of being charged with capital murder; and (3) Lieutenant Pierpont did not know whether references to the death penalty caused Epifanio to feel pressure or fear. These statements lack any credibility given the totality of the circumstances at the time of the interrogation.
- Lieutenant Pierpont's willingness to mischaracterize Epifanio's interrogation in official police reports damaged Lieutenant Pierpont's credibility. During the interrogation, Epifanio repeatedly denied that Carter said he was "going to rape the victim." Evid. Hr'g. Tr. pp. 133-140; Exhibit F. This was a material issue in the case. Nevertheless, Lieutenant Pierpont (1) attempted (albeit unsuccessfully) to attribute this statement to Carter in the written statement Lieutenant Pierpont dictated for Epifanio to sign; and (2) reported in his April 12, 1985 Supplementary Report: "[Carter] also told Tovar that he

was going to rape Ms. Oleson but after he got her pants down he saw that she was having her period therefore he did not have any sexual contact with her.” (Exhibit 15, p. 2).

Credibility of Officer Mack

Officer Mack’s testimony was credible on two points: (1) at the direction of Lieutenant Pierpont, Officer Mack paid financial benefits to the Tovars over a period of 8-9 months prior to trial—testimony corroborated by the Tovars; and (2) Officer Mack caused Christmas gifts to be delivered to the Tovars after Carter’s murder trial, but before Christmas 1985—testimony consistent with the Mack family’s routine practice.

But Officer Mack’s inconsistent statements—all aimed at painting the police and his own conduct in a more favorable light—seriously undermined his credibility. The Court makes this finding because:

- At first, Officer Mack understated by half or more the total value of financial benefit paid by police to the Tovars.
- In May 2011, Officer Mack signed a sworn declaration. In that declaration, he stated that the Carter murder case was “one of the biggest cases in the history of the Provo Police Department because the victim was the aunt of [] Swen Nielsen, [the] chief of police.” (Exhibit 27, ¶ 15). In Officer Mack’s assessment: “We were all emotionally involved in the case.” Officer Mack then expressed concern that Chief Nielsen “was too close to this particular case” and “should have been more at arm’s length.” (Exhibit 27, ¶ 16). Officer Mack stated that Chief Nielsen “gave briefings on the case, made assignments, and was intimately involved.” *Id.* Of particular concern to Officer Mack was the fact that Chief Nielsen spoke at Ms. Oleson’s funeral and said positive things about her

husband, Orla Oleson. This concerned Officer Mack because, at the time, Orla Oleson was “the primary suspect” in Mrs. Oleson’s murder. (Exhibit 27, ¶ 17).

- But at the evidentiary hearing, Officer Mack backtracked from these sworn statements in his 2011 declaration. At the hearing he testified that: (1) any pressure on the police was “self-imposed” and did not come from Chief Nielsen; (2) Chief Nielsen did not give briefings to the media or to other police officers, or at least none that Officer Mack could remember in which Chief Nielsen took a major role; (3) Chief Nielsen “assigned the case out and the rest of us did the investigation;” (4) most of the assignments came from Lieutenant Pierpont; (5) he would not go so far as to say that Chief Nielsen was “too involved” and after the first night, Chief Nielsen was not involved in the day to day investigation; (6) he only had concerns about Chief Nielsen’s involvement a couple of times at the beginning of the case, particularly at the funeral. Evid. Hr’g. Trans. Nov. 16, 2021, at 69-72, 109-11.
- The Court finds that Officer Mack’s 2011 sworn declaration is more credible than his testimony at the evidentiary hearing. The declaration was made at a time when Officer Mack believed these PCRA proceedings to be—in his own words—“frivolous,” “silly,” “ridiculous,” “unimportant” and “meaningless.” With nothing at stake, Officer Mack was in his declaration free to speak with candor and he did. Later, when Carter’s PCRA claims were litigated before this Court, Officer Mack realized his candor might result in Carter’s conviction and sentence being set aside. Only then did Officer Mack come to view Chief Nielsen’s conduct during the investigation with a less critical eye, and assert that any pressure on the police department was self-imposed, not Chief-imposed.
- Moreover, the trial record confirms that Chief Nielsen’s shadow loomed large at trial.

That shadow was of such concern to defense counsel that he addressed it directly in closing argument: “[H]opefully, we could have this trial without the giant shadow of Chief Swen Nielsen. And I say that not negatively, my observation, the Chief is a very fine man. Not only have we had the shadow, forget about the shadow, he has been here everyday, and he has been here with his family. That's not a negative, he has a right to be here, he's concerned, they have a right to be here, and if I were in their situation, I would have been here everyday also. And so I hold it not against them. But I say, as you deliberate in this cause, on this charge, with this law, with the set of facts concerning Douglas Carter and us; no man is such a giant and no shadow is so big and broad, and the presence of all of us after you retire is secondary; you, the twelve people, who will deliberate and make decisions.” (1985 Tr. Trans. at 1356).

Credibility of Wayne Watson

The Court finds that Wayne Watson was not a credible witness. The Court makes this finding because:

- Watson’s willingness to simply guess at facts rather than admit to lack of memory significantly undermined his credibility. For example:
 - At first Watson testified that at the time of the trial he did not know that the Tovars were not legal residents of the United States. Exhibit 4 at 9.
 - Then, Watson said he had no memory of the Tovars and did not think he called them as witnesses. *Id.* at 10.
 - After learning from counsel that in fact he did call both Epifanio and Lucia as witnesses, Watson testified that the State had not relied heavily on the Tovars’ incriminating testimony. In fact, Watson stated that he “didn’t even need [the

Tovars]” and “might have thrown them in for extra source.” *Id.* at 10-12.

- In fact, the record evidence demonstrates that the State needed the Tovars’ testimony and relied heavily upon it to corroborate a confession that might not have stood on its own.
- Watson admitted to knowing about the rent payments made on behalf of the Tovars by police, but in his view he had no duty to correct Epifanio’s false testimony about receiving only a \$14 witness fee because: (1) Watson did not know the exact amount that Provo police had paid for the Tovars’ rent; and (2) Watson “probably would assume [the correction] is coming later” from defense counsel. *Id.* at 37-41. This self-serving view is inconsistent with well-recognized law requiring a prosecutor to correct false testimony.
- During his deposition, Watson manifested a persistent unwillingness to concede the obvious. For example:
 - Watson was unwilling to admit that a hearsay statement from a Ms. Dahlquist that “Orla Oleson would kill Eva [Oleson]” would have been—aside from the question of admissibility—something defense counsel would have investigated as potentially useful. *Id.* at 14-17.
 - When asked whether it was possible, even with an open file policy, for *Brady* material (like Anne Carter’s immunity agreement) to “slip through the cracks,” Watson answered: “No. Anything’s possible, but not in the death penalty cases and not in [the] Utah County attorney’s office.” *Id.* at 30-31, 73.
 - Watson was asked whether evidence that a defendant laughed when retelling how he committed murder would be “a powerful fact to use in obtaining a death

sentence.” *Id.* at 61-62. Watson equivocated, but ultimately answered: “not in my book.” *Id.* In fact, the record shows that in the 1985 penalty phase of Carter’s trial, Watson emphasized this very fact. He asked the jury: “How did [Carter] feel about it while he did it? Perhaps the best evidence of that is how he was a few minutes later at the Tovar’s home, as he over and over again demonstrated to them what he had done. Was excited, was laughing, was giggling, telling them to watch television to see what he had done, ‘look what I’ve done.’ He wasn’t sickened, he wasn’t saddened, he wasn’t even frightened. He was thrilled.” (1985 Penalty Phase Trans. at 1266).

- Watson was unwilling to admit that expert testimony about a defendant’s low IQ . . . that borders on intellectual disability, what we used to call mental retardation, might have an effect on how a jury views a confession” by the defendant. Evid. Hr’g. Tran. Nov. 18, 2021, at 67.
- Watson clearly took Carter’s PCRA case as an affront to him personally. The deposition transcript is replete with evidence of this personal bias, a few include:
 - Watson accusing defense investigators of being “very adept at putting words in these people’s mouths” and stating that this was “obvious when you read this crap.” *Id.* at 60.
 - Watson telling Carter’s counsel “Shame on you.” *Id.* at 60.
 - Watson’s non-responsive recitation of the facts he observed at the crime scene, defense of his decision to seek the death penalty, and self-focused declaration: “And I filed the death penalty charge, and I pursued it, and we were successful doing it.” *Id.* at 62-64.

- Watson’s diatribe against the Supreme Court and former Supreme Court Justice Christine Durham which reads: “I tell you, the Supreme Court ought to stick to what they know and not what they are guessing. Justice Durham was the worst of the bunch, to put on her prosecutor’s hat and came in and told us what we should be doing in every case that I ever read by her.” *Id.* at 74.
- Watson’s asides to counsel for the State manifested a general disrespect for the deposition and these proceedings. When pressed on issues he deemed improper subjects of inquiry, he (1) told counsel for the State: “You are not going to whisper to me, send me notes, nothing? Not even shut up?” *id.* at 68; (2) told counsel for the State: “Object to that. Will you please?” and then refused to answer on the basis of the objection he elicited, *id.* at 74-75; (3) told defense counsel: “And you think [my alleged contact with the police officer who arrested me for DUI] is relevant to the honesty and truthfulness of my deposition her today? . . . I’m not going to answer any more questions. They are all bunk, and especially when you pull this crap out of the file, *id.* at 78.
- Michael Esplin—a seasoned and well-respected defense lawyer in Utah County who tried a number of cases on the opposite side of Watson—opined that Watson’s reputation for truthfulness was poor.

Credibility of Epifanio and Lucia Tovar

Like other witnesses, Epifanio and Lucia did not have a perfect memory of events occurring in 1985. But the Court finds Epifanio and Lucia to be credible witnesses. The Court makes this finding because:

- Their testimony about financial benefits being paid to them was corroborated by Officer Mack.

- Lucia's report that Lieutenant Pierpont threatened her with deportation was corroborated by Mack's testimony that Lucia had in fact reported this to him.
- The Tovars have nothing to gain by reporting that police paid them, threatened them, and coached their testimony in 1985. Indeed, reporting this information has proved personally distressing to them. They have been required to dredge up memories of what was clearly a dark time in their early married life together. And during these proceedings, both Epifanio and Lucia were cross-examined about the death of their son.
- The Tovars did not have any contact with Carter after his conviction and sentence in 1985. They have no incentive to offer testimony favorable to him.

Credibility of Perla Lacayo

The Court finds that the testimony given by Perla Lacayo at the evidentiary hearing was not credible. The Court makes this finding because:

- During her testimony at the hearing, Perla answered "I don't remember" more than one hundred times. Whether these claims not to remember are credible is difficult to determine.
- On the one hand, the claims lack credibility because (1) Perla claimed not to remember events both recent⁷ and distant in time. Evid. Hr'g. Trans. Nov. 17, 2021, at 160-61; and (2) for the past 15 years Perla has maintained contact with Carter, exchanging letters with him, speaking to him on the phone, and putting money on his commissary account. She last deposited money on Carter's commissary account

⁷ Recent events Perla claimed not to remember include (1) the last time she wrote to Carter; (2) the last time Carter wrote to her; (3) the last time she donated money to Carter's commissary account at the prison; and (4) whether she was served with a subpoena to appear at the hearing on October 30. Evid. Hr'g. Tran. Nov. 17, 2021, at 73, 160.

approximately two years ago. Her most recent telephone conversation with him occurred just two weeks before her testimony at the hearing. *Id.* at 73-74, 158.

- On the other hand, some of Perla's inability to remember can be attributed to other factors. These factors include:
 - The passage of more than 35 years since the murder of Ms. Oleson and the arrest and conviction of Carter;
 - Perla currently suffers from and takes medication for anxiety, panic attacks, and depression. These conditions have persisted for a long time, exacerbated by her experiences during the Carter murder case.
 - The trauma Perla experienced in connection with the case.
 - Perla testified that she was "really scared" when interviewed by police in 1985. When asked whether she felt she had experienced trauma related to the Carter case, Perla articulated one deep-seeded memory: "The trauma that I have, and I will always never forget, is—is when they—the police came into my house with the gun looking for Douglas, and the intimidation they're going to take my kids away. So I feel intimidated, and I got that trauma, and that's always have it in my mind." *Id.* at 164.
 - Perla testified that this trauma does affect her memory, but only "a little bit." *Id.* at 164-65.
- Some of Perla's inability to remember is a function of her trauma, her mental health conditions, and the passage of time. However, these factors do not plausibly account for the numerous times that Perla claimed not to remember.

- For these reasons, the Court finds that Perla’s repeated claims “not to remember” are for the most part motivated by her friendship with Carter and her desire not to undermine his claims in this case.
- As a practical matter, because of Perla’s repeated claims of no memory, much of her testimony at the evidentiary consisted of her prior inconsistent statements made in 1985.

b. Financial Benefits Paid to the Tovars

1. In February 1985, Lieutenant Pierpont was the lead investigator of the major case squad assigned to investigate the murder of Mrs. Oleson. Evid. Hr’g. Tran. Nov. 18, 2021, at 6. In that position, he directed the investigation and made assignments to others. *Id.* at 7. He reported to his direct supervisor, Captain Warren Grossgebauer. *Id.*
2. Either Lieutenant Pierpont or Captain Grossgebauer assigned Officer Mack “to keep track of [the Tovars] and to care for any of their needs that—that they were concerned about.” *Id.* at 36. Officer Mack was also required to provide extra patrols around the Tovars’ residence. *Id.* at 37.
3. Officer Mack was assigned to this role because the Tovars spoke Spanish and so did he. *Id.* at 36; Evid. Hr’g. Trans. Nov. 16, 2021, at 72.
4. In Officer Mack’s words, “it was my responsibility to make certain that the Tovars were happy.” Evid. Hr’g. Trans. Nov. 16, 2021, at 75.
5. After the Tovars were identified as witnesses, Officer Mack visited them “two to three times a week, maybe more.” *Id.* at 121. His objective was to “mak[e] sure that—that they were taken care of to where they didn’t leave town for employment, or—or that they didn’t go back to Mexico or—or—that they were completely watched and taken care of.”

Id. at 121, 128-29.

6. As part of that effort, Officer Mack “provided the Tovars with items of financial value.”
Id. This financial support was given over a period of 8-9 months prior to trial and included money for rent, bills, and groceries. *Id.* at 75.
7. The police “basically took care of [the Tovars’] daily living expenses” but not 100 percent because Epifanio worked some too. *Id.* at 76. Officer Mack remembered giving the Tovars cash, but not very often. *Id.* at 128.
8. Officer Mack’s responsibility included providing money to the Tovars. In Officer Mack’s words, he was to “make sure if [the Tovars] did or did not [need money]” and “if they needed money, we—I took it. . . . If they needed anything, I was there to help them.” *Id.* at 128, 131.
9. Officer Mack first testified that the financial benefits “totaled a couple of a thousand” dollars. *Id.* The Court does not find this testimony credible.
10. Officer Mack agreed that an amount of \$400 for the Tovars’ rent sounded right, and that he paid the living expenses for the Tovars, including rent, for 8-9 months. *Id.*
11. Therefore, the total value of payments made to the Tovars for rent, utilities, phone and groceries by the police likely exceeded \$4,000.
12. In making these payments to the Tovars, Officer Mack was “just following [the] orders” of Lieutenant Pierpont. *Id.* at 81. As Officer Mack stated, he was “sure” Lieutenant Pierpont knew about the payments. Indeed, it was Lieutenant Pierpont who told Officer Mack to pay the Tovars’ rent. *Id.* at 193.
13. Other people in the police department knew about the payments. As Officer Mack testified “Of course. I didn’t do it on my own.” *Id.* at 81. (Tr. Trans. p. 81).

14. Lieutenant Pierpont was aware of the rent payments and other financial benefits that Officer Mack paid to or on behalf of the Tovars. The Court makes this finding because:
- a. As the lead investigator assigned to the Carter case, Lieutenant Pierpont was responsible for directing the investigation and making assignments;
 - b. In the role of lead investigator, Lieutenant Pierpont knew about Officer Mack's assignment to care for the Tovars' monetary needs;
 - c. While Lieutenant Pierpont had no direct day-to-day contact with the Tovars, he instructed them to check in regularly either with him or with Officer Mack. Evid. Hr'g. Tran. Nov. 18, 2021, at 37.
 - d. Officer Mack reported directly to Lieutenant Pierpont regarding Officer Mack's work relating to the Carter case;
 - e. Officer Mack has a clear memory of providing the financial benefits and doing so because he was "following orders."
 - f. In the command structure, those orders would have come to Officer Mack from his direct supervisor and the lead investigator, Lieutenant Pierpont.
15. Like police investigators, Wayne Watson knew before trial about all of the financial benefits paid by police to or on behalf of the Tovars. The fact that the benefits were being paid was well-known among those working on the case. And as Officer Mack confirmed, it is reasonable to infer that Watson knew about the payments too.
16. But finding that Watson was aware of the financial benefits paid to the Tovars need not rest on inference alone. Watson himself testified that he knew about the rent payments because Lieutenant Pierpont told him about the payments.
17. Moreover, Watson's own hand-written notes confirm that he knew financial benefits had

been paid to the Tovars. The notes read: “Epifanio / \$ only deposit on apartment / deposit on phone.”

18. The Court finds by a preponderance of the evidence that these hand-written notes were prepared by Watson before Epifanio testified at trial. The Court makes this finding because:

- a. The fact that police were providing financial benefits to the Tovars was well-known to the investigative team prior to trial; and
- b. The notes document the payment of a deposit on an apartment. A deposit would be required upon the Tovars moving into a new apartment. This happened two times, both before trial.
- c. The notes were discovered in the middle of the Utah County Attorney’s case records—box 5 of 8 related to the Carter murder trial.
- d. The note documenting cash payments to or on behalf of the Tovars is the third page of a five-page series of notes. The other four pages record in detail Epifanio’s anticipated trial testimony. (Exhibit 3, pp. 1-5). The Court makes this finding because it is unlikely that Watson would have taken such detailed notes during his own direct examination of Epifanio at trial.

19. The State of Utah did not disclose to defense counsel any of the financial benefits paid by the police to or on behalf of the Tovars.

20. The reason police paid financial benefits to or on behalf of the Tovars is disputed. On this factual question, the Court finds that:

- a. The payments were not made to or on behalf of the Tovars as part of a “witness

protection program.”

- b. In 1985, no witness protection program existed under the policies or directives of the Provo City police department. Instead, money was distributed from a “confidential expenditures account” for a variety of purposes, unchecked by meaningful financial accounting controls or oversight. Monies from the confidential expenditures account could be used to protect a witness, but they were also used for a host of other reasons unrelated to witness protection.
 - c. Lieutenant Pierpont suggested that disbursements from the fund would be processed through the City financial department and documented with a receipt. But no such records were admitted into evidence.
 - d. Between April 12, 1985, when Epifanio was arrested, and June 11, 1985, when Carter was detained in Nashville, Tennessee, police in Provo knew Carter had been transported to Wendover to board a bus, but they did not know the precise whereabouts of Carter. *Id.* at 40. During this period, the reasons for moving the Tovars, paying their rent, and providing extra patrols around their residence may have included a protective component.
 - e. But this protective purpose was minimal given Carter’s flight from Utah and had certainly dissipated after Carter’s arrest in Nashville. After his detention in Nashville, Carter was held in custody through trial and sentencing. While in custody, Carter presented no threat of harm to the Tovars.
 - f. Nevertheless, from June 11, 1985, to trial, Officer Mack continued to make regular rent payments and other payments to or on behalf of the Tovars.
21. Thus, contrary to Lieutenant Pierpont’s testimony, the “sole purpose” of paying the

Tovars was not to protect them. Whatever protective purpose the police may have had in making payments to or on behalf of the Tovars was nominal. The primary reason the police paid the Tovars' expenses was to ensure that the Tovars remained living in Utah until trial. The Court makes this finding because:

- a. The Tovars were not residing legally in the United States and the police knew this.
 - b. In his interrogation with Lieutenant Pierpont, Epifanio had suggested that he and his family might leave Utah.
 - c. Lieutenant Pierpont learned from federal immigration authorities that an immigration hold on Epifanio would result in his swift transfer to California and deportation. Therefore, an immigration hold was counter-productive for the police.
22. In summary, the Court finds that police paid financial benefits to the Tovars to ensure their continued availability and cooperation as trial witnesses. The practical effect of those payments was to make the Tovars dependent upon and beholden to police as their benefactors.
23. In addition to the financial benefits described above, Officer Mack, acting in his personal capacity, arranged for a Christmas tree and gifts to be provided to the Tovars.
24. Officer Mack caused these gifts to be delivered anonymously. There is no evidence that Watson, Lieutenant Pierpont, or any other police officer was aware that the Tovars had received the Christmas tree and gifts, or that Officer Mack was the giver.
25. Officer Mack caused these gifts to be delivered in his personal capacity. After trial, he had no further contact with the Tovars in his official capacity as a peace officer. After

trial, he had no official duty to monitor the Tovars' whereabouts or their needs.

26. The Christmas tree and gifts were delivered sometime after the end of trial (December 19, 1985) and before Christmas Day. The Court makes this finding because:

- a. It was the Mack family's routine practice to deliver Christmas gifts anonymously to a family in need close to Christmas Day.
- b. Officer Mack had a personal belief that in Latin culture the most important day of the Christmas season is Christmas Eve. Therefore, he would have delivered the gifts close to that day.
- c. Admittedly, Officer Mack's recollection about when the gifts were delivered was uncertain. He testified to "struggling trying to figure it out" and only did so with the help of both his wife and counsel for the State. *Id.* at 73, 78. But the totality of the evidence preponderates in favor of a finding that the Christmas tree and Christmas gifts were delivered sometime after the last day of trial.

c. Threats to the Tovars of Arrest, Deportation, and Loss of Son

1. On February 27, 1985, Epifanio Tovar was 19 years old. He and his wife, Lucia, were the parents of an infant son. They were not legal residents of the United States.
2. Epifanio understood and spoke some English but was not proficient. During the Carter trial, Epifanio requested the assistance of an interpreter. Lucia spoke only Spanish and understood very little English.
3. Epifanio and Lucia were unsophisticated. Epifanio had only an eighth-grade education. Neither Epifanio nor Lucia had a working knowledge of the role police and prosecutors played in the state criminal justice system. For example, Epifanio believed that prosecutor Watson was "the boss" of the police. Exhibit 1 at 61, 63.

4. Both Epifanio and Lucia believed that Provo City police officers had authority to deport them from the United States. They believed this for two reasons.
 - a. First, Epifanio saw an immigration officer at the Provo City Police Department immediately before he was interrogated by Lieutenant Pierpont. *Id.* at 33-34.
 - b. Second, and by far the weightier reason, both Officer Mack and Lieutenant Pierpont had each at different times threatened to deport the Tovars.
5. Early in his work with the Tovars, Officer Mack learned that both Lucia and Epifanio were not legal residents of the United States. Evid. Hr'g. Trans. Nov. 16, 2021, at 91, 117, 139.
6. Lieutenant Pierpont learned that Epifanio Tovar was not a legal resident sometime in the three days following Epifanio's interrogation on April 12, 1985. Certainly, by April 15, 1985—the date Lieutenant Pierpont contacted the immigration department to inquire about placing an immigration hold on Epifanio—Lieutenant Pierpont was aware that both Epifanio and Lucia were not legal residents of the United States. Lieutenant Pierpont would have communicated this information to Officer Mack, the peace officer Lieutenant Pierpont assigned to care for the Tovars' needs.
7. Lucia testified that Officer Mack threatened her and Epifanio with arrest, deportation, and loss of their son, and that this occurred at least three times. Evid. Hr'g. Tran. Nov. 16, 2021, at 8, 42. The Court finds this testimony credible.
8. The first time Officer Mack made this threat was when he came to Lucia's house looking for Epifanio to arrest him. *Id.* at 42-43. He made the threat because he wanted to detain Epifanio so that he would talk about what he knew. *Id.* at 44-45.
9. The second time Officer Mack made this threat was after Epifanio was arrested and Lucia

asked to see him. *Id.* at 42.

10. The third time Officer Mack made this threat was when he told Lucia “not to say anything regarding the assistance [the police] were giving us.” *Id.* at 12-13, 34, 45, 63. This third threat was made in an office at the courthouse. The occupants of the office were Lucia, Epifanio, Officer Mack and a man sitting behind some furniture. *Id.* at 45-46. This meeting occurred before trial. *Id.*
11. The Court finds that these three instances were not the only times Officer Mack threatened Lucia with deportation. In Lucia’s words, Officer Mack “was always telling things like, oh, they are going to deport you.” *Id.* at 62.
12. Officer Mack’s testimony corroborates Lucia’s testimony about police threats of deportation. Officer Mack testified that on multiple occasions, Lucia told Officer Mack that she was afraid of being deported. She would talk about “somebody else making threats to them about deporting them.” Lucia could not say the name of this person very well, and though he could not be sure, Officer Mack was “pretty sure she meant Pierpont.” *Id.* at 140.
13. In his deposition, Officer Mack testified that he told Lucia “as long as you’re working with us, [deportation] was not going to happen.” *Id.* at 93. This was a threat that if the Tovars stopped cooperating with the police, deportation would ensue.
14. At the evidentiary hearing, Officer Mack backtracked from his deposition testimony. At the hearing, he testified that he told Lucia “as long as [she and Epifanio] are involved in a murder case, . . . no agency would be sending her back to Mexico.” *Id.* at 92.
15. The Court finds that Officer Mack’s deposition testimony about his response to Lucia is more credible than his evidentiary hearing testimony. The Court makes this finding

because:

- a. The deposition testimony represents Officer Mack's first memory of his response to Lucia;
- b. Officer Mack articulated that memory at a time when he still viewed these PCRA proceedings as "frivolous," "silly," and of no consequence. With apparently nothing at stake, Officer Mack was free to speak with candor and he did. *Id.* at 100-101.
- c. By the time of the evidentiary hearing, Officer Mack's view of these proceedings as "frivolous" and "silly" had proved unfounded. Then, Officer Mack had a motive to be more circumspect—to tie Lucia's non-deportation to her mere "involvement" in the Carter case, not to her "cooperation" with the police.
- d. For the reasons stated in section 5.a above, the Court finds Officer Mack not to be a credible witness on the question of whether police threatened the Tovars with arrest, deportation, and loss of their son.

16. The Court finds that Lieutenant Pierpont made at least one direct threat of deportation to Lucia, and that this was an indirect threat of deportation to Epifanio. The Court makes this finding because:

- a. On direct examination, Lieutenant Pierpont denied threatening Epifanio with immigration-related consequences before or during Lieutenant Pierpont's interrogation of Epifanio. Evid. Hr'g. Tran. Nov. 18, 2021, at 33.

Counsel then asked whether Lieutenant Pierpont had made such threats to Epifanio during the period after the interrogation on April 12, 1985, through the time of trial in December 1985. Lieutenant Pierpont answered this question with a

question: “Directly to him?” Counsel answered. “Yes.” Lieutenant Pierpont then answered “No.” *Id.*

- b. This evasive response was telling. By limiting his answer to a denial of “direct threats” to Epifanio only, Lieutenant Pierpont left open the obvious question of his ever having made indirect threats of deportation to Epifanio through Lucia or others.
 - c. By April 15, 1985, Lieutenant Pierpont knew the Tovars were not legal residents of the United States;
 - d. Lieutenant Pierpont instructed the Tovars to stay in contact with him or Officer Mack, giving Lieutenant Pierpont opportunity to threaten the Tovars;
 - e. On multiple occasions, Lucia told Officer Mack that she was afraid of being deported. She would talk about “somebody else making threats to them about deporting them.” Evid. Hr’g. Trans. Nov. 16, 2021, at 140. Lucia could not say the name of this person threatening her very well, but Officer Mack was “pretty sure she meant Pierpont” *Id.*
 - f. For the reasons stated in section 5.a above, the Court finds that Lieutenant Pierpont is not a credible witness.
17. As a practical matter, these threats of deportation meant arrest of the Tovars and separation of their family. Lucia was from Nicaragua. Epifanio was from Mexico. Therefore, deportation would result in either Lucia or Epifanio losing their infant son.
18. Officer Mack and Lieutenant Pierpont both testified that as state police officers they lacked authority to deport the Tovars. But there is no evidence that they communicated this fact to the Tovars.

19. All the Tovars knew was that they were illegal residents of the United States, the Provo Police Department knew it, and two officers from that Department had made threats to deport them. The Tovars had no reason not to take Officer Mack and Lieutenant Pierpont at their word.
20. The State did not disclose to Carter's counsel that Officer Mack and Lieutenant Pierpont had threatened the Tovars with arrest, deportation, and the resulting loss of their son.

d. Coaching of the Tovars' Trial Testimony by Police

1. Officer Mack emphatically denied ever telling the Tovars not to disclose at trial the payments made to them by police. (Tr. Trans. 144-45; 182, 189). In his view, such coaching was criminal and unnecessary, given the corroborating confession. (Tr. Trans. pp. 145-46). The Court does not find this testimony credible.
2. Lieutenant Pierpont denied ever telling Epifanio and Lucia to "lie about anything." (Hearing Tr. p. 67). He denied telling the Tovars to say anything specific when they were called to testify. *Id.* He denied telling the Tovars to "deny receiving benefits from the police or anybody else if they were ever asked about it [at trial]." *Id.*
3. The Court finds by a preponderance of the evidence that Officer Mack instructed the Tovars to lie about receiving financial benefits from the police if asked about the benefits at trial. The Court makes this finding because:
 - a. Officer Mack was responsible for paying the financial benefits on behalf of the Tovars. He knew that the payments to them had exceeded \$4,000 over an 8 to 9 month period.
 - b. After Epifanio's release from custody, Provo Police regularly patrolled near the Tovar residence. Officer Mack visited the Tovars multiple times each week and

developed what, in his view, was a friendly relationship with them.

- c. In 1985, Epifanio understood and spoke English but was not proficient. During the Carter trial, he requested the assistance of an interpreter. Lucia spoke only Spanish and understood very little English. Officer Mack was the one police officer who spoke to the Tovars in Spanish.
- d. For their part, the Tovars felt that they were under police surveillance. Whatever purpose this heightened police presence served in keeping the Tovars in Utah, it was also a persistent reminder of the power police had over the Tovars and their continued life together in the United States as a family. This fact could not have been lost upon Officer Mack and Lieutenant Pierpont.
- e. Epifanio and Lucia were not legal residents of the United States and both Officer Mack and Lieutenant Pierpont knew it.
- f. Epifanio and Lucia were unsophisticated. Neither of them had a working knowledge of the state criminal justice system. Both erroneously believed that the Provo Police Department had authority to deport them. And both Officer Mack and Lieutenant Pierpont had threatened deportation.
- g. All these circumstances combined to create a significant imbalance of power in the relationship between Officer Mack and the Tovars. This would have given Officer Mack confidence in his ability to instruct the Tovars about what not to say at trial, and to do so with little risk of his misconduct being reported or discovered.
- h. The Tovars had no reason to believe that Officer Mack's instruction not to disclose the financial benefits at trial was improper.

- i. Absent an express instruction not to disclose the financial benefits paid to them or on their behalf, the Tovars had no reason to testify falsely about the benefits or to believe that the fact of the payments damaged the State's case in some way.
 - j. The Tovars had nothing to gain by disclosing the instruction not to testify about financial benefits paid to them. They have had no contact with Carter since his conviction in 1985 and have no incentive to offer testimony that is favorable to him.
 - k. Finally, Lucia remembers being instructed not to say anything about the financial benefits paid by police. The instruction was given to the Tovars in an office at the courthouse before trial. Lucia, Epifanio, Officer Mack, and a man seated behind some furniture were present.
 - l. The Court finds by a preponderance of the evidence that the man seated behind the furniture was Watson.
4. At the evidentiary hearing, Epifanio testified that immediately before trial, he was in an office at the courthouse. Lieutenant Pierpont and Watson were both present. In this meeting, the phrase "rape, break, and drive" came up.
5. When asked why he lied at trial about Carter saying he was going to "rape, break, and drive," Epifanio testified "because that's what they wanted me to say." When asked who wanted him to say this, Epifanio said it was either Watson or Lieutenant Pierpont.
6. The Court finds this testimony of Epifanio credible.
7. For his part, Lieutenant Pierpont denied ever hearing the phrase "rape, break, and drive" before Epifanio said it at trial. (Hearing Tr. p. 56). And Lieutenant Pierpont denied

“giving” this phrase to Epifanio. *Id.* The Court does not find this testimony credible.

The reasons for this finding are:

- a. In his interrogation of Epifanio, Lieutenant Pierpont demonstrated a strong motive to discover an admission that Carter had intended to rape Ms. Oleson.
- b. Notwithstanding Epifanio’s repeated assertions that Carter had never said he was “going to rape the victim,” Lieutenant Pierpont (1) attempted (albeit unsuccessfully) to insert this very fact into the written statement he dictated for Epifanio to sign; and (2) prepared a supplementary report falsely stating that—according to Epifanio—Carter said he was going to rape the victim.
- c. The State had charged Carter with aggravated murder. One of the alleged aggravating factors was that Carter had committed the murder in the course of committing or attempting to commit rape. The State’s evidence of rape or attempted rape was not robust, a point conceded by Watson in his closing argument. (1985 Trial Tr. p 1349).
- d. Epifanio’s description of the meeting at which the phrase “rape, break, and drive” came up—in an office, at the courthouse, before trial, with a police officer and Watson present—is strikingly consistent with the meeting described by Lucia. Lucia testified to attending a meeting in an office at the courthouse before trial. The only difference is that Officer Mack—rather than Lieutenant Pierpont—was present at the meeting. This would make sense because Lucia, more than Epifanio, would have required Officer Mack as an interpreter.
- e. These brief meetings with the Tovars at the courthouse shortly before trial are consistent with Watson’s routine practice of doing little to prepare adult witnesses

to testify at trial.

- f. The purpose of the meetings was to prepare the Tovars to testify at trial. In the meeting Lucia described, Officer Mack instructed the Tovars not to disclose the financial benefits paid to them by police.
- g. The meeting with Epifanio presented a similar opportunity for Lieutenant Pierpont to instruct Epifanio about “rape, break, and drive.” However, the Court finds that Lieutenant Pierpont had given the instruction at some time prior to the meeting—or at least prior to Watson joining the meeting. In Watson’s presence, as trial preparation of Epifanio ensued, the phrase “rape, break, and drive” came up—and the reason it came up was because that is what Lieutenant Pierpont had previously told Epifanio to say. As Epifanio testified, Watson never told him to say anything that was not the truth.
- h. The State argues that the English phrase “rape, break, and drive” is syntactically awkward and therefore more likely to be of Spanish origin.⁸ The Court disagrees. The Court finds that the English phrase “rape, break, and drive” is a memorable one, made more powerful by (1) assonance—the repetition of vowel sounds—in the words “rape” and “break;” and (2) substantive meaning, in that the phrase succinctly imputes to Carter a pre-existing intent to rape someone, break her in the process, and then flee to avoid apprehension. The powerful and memorable character of the phrase “rape, break, and drive” was not lost upon the 1992 sentencing prosecutor who upon its persuasive force in seeking a death sentence for Carter. Finally, the English phrase “rape, break, and drive” appears no more syntactically awkward than the Spanish equivalent: “violar, romper y manejar.”⁹

⁸ The State presented no expert testimony about linguistics or the origin of English or Spanish words.

- i. For the reasons set out previously, the imbalance of power in the relationship between Epifanio and Lieutenant Pierpont, created an environment in which Lieutenant Pierpont could instruct Epifanio to testify falsely, and to do so with little risk that his misconduct would be reported or discovered.

e. Failure to Correct False Testimony About Financial Benefits

1. As found above, prior to trial both Watson and Lieutenant Pierpont were aware of the financial benefits paid to and on behalf of the Tovars.
2. Watson and Lieutenant Pierpont sat together at counsel table during trial. Both men personally witnessed Epifanio testify falsely about financial benefits paid to him or on his behalf.
3. The trial transcript demonstrates that Epifanio lied about this not once, but five times.

Q: Mr. Tovar, did you and or your family anytime between February and now receive money or support from Mr. Watson's office or from Mr. Pierpont, the police?

A: Just, we just received fourteen dollars.

Q: Just fourteen dollars?

A: Yes, a check from the City.

Q: Nothing else that they offered you or gave you to stay and be available because you had to be a witness in this case?

A: No.

Q: What about your family, your wife?

A: No.

Q: You are not on any kind of aid?

A: No. They just gave us a check, one for each of us, since that last court.

(1985 Tr. Trans. at 1164).

⁹ Collins Beginners' Spanish Dictionary, <https://www.collinsdictionary.com/us/translator> (last visited on November 22, 2022).

4. Watson and Lieutenant Pierpont both knew that Epifanio had testified falsely.
5. Watson did nothing to correct this false testimony.

f. Failure to Correct False Testimony About “Rape, break, and Drive”

1. It is undisputed that Epifanio testified falsely about Carter saying “rape, break, and drive.”
2. Lieutenant Pierpont instructed Epifanio to testify falsely that Carter said he was going to “rape, break, and drive” before the murder.
3. In the meeting in an office at the courthouse shortly before trial, Watson met with Epifanio and Lieutenant Pierpont. In that meeting, the phrase “rape, break, and drive” came up. And the reason it came up is because Lieutenant Pierpont had told Epifanio to say it.
4. But Carter has failed to prove that Watson personally knew “rape, break, and drive” was false testimony, or that Watson ever instructed Epifanio to impute this phrase to Carter. Epifanio testified that Watson never told him to testify to anything that was not the truth.
5. The trial transcript suggests Watson’s surprise at the phrase “rape, break, and drive.”

The trial transcript reads:

Watson: What, if anything, did [Carter] tell you he was going to do when he left the first time?

Epifanio: He was going to go rape, break, and drive.

Watson: Did he tell you that?

Epifanio: Yes.

Watson: What’s your best recollection, Mr. Tovar, of what [Carter] told you he was going to do? Tell me what you remember him saying?

Epifanio: That he was going to go break into a house.

Watson: And what, if any, purpose did he tell you why he was going to do that?

Epifanio: Needed money.

(Tr. Trans. pp. 1129-30).

6. Discussion of Claims 1 and 2: Violations of *Brady v. Maryland*

Petitioner claims the prosecutors failed to disclose material impeachment evidence. This evidence consisted of (1) the financial benefits paid by police to or on behalf of Epifanio and Lucia; (2) the threats made by police to arrest, deport, and separate Epifanio and Lucia from each other and their son; (3) the police coaching the Tovars not disclose at trial the financial benefits paid to them or on the their behalf by police; and (4) the police coaching Epifanio to say that Carter said he was going to go “rape, break, and drive” before the murder.

a. Legal Standard

“[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. at 87. “[T]he duty to disclose favorable evidence encompasses both exculpatory and impeachment evidence.” *Tillman v. State*, 2005 UT 56, ¶ 27 (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)). And “[t]he duty to disclose favorable evidence is implicated even if the evidence is known only to police investigators and not the prosecutor regardless of whether the evidence has been requested by the accused.” *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)).

The Utah Supreme Court has recognized three components that a defendant must demonstrate to establish a *Brady* discovery violation: (a) “the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching;” (b) “the evidence was

suppressed by the State, either willfully or inadvertently;” and (c) “prejudice ensued.” *Tillman v. State*, 2005 UT 56, ¶ 28 (internal quotations omitted). The court will examine each of these components to determine whether the State committed a *Brady* violation that justifies a new trial, a new sentencing trial, or both.

1. The evidence is favorable to Carter

Evidence that the police had paid more than \$4,000 in financial benefits to or on behalf of the Tovars prior to trial is impeachment evidence favorable to Carter. Granted, if the payments had been disclosed, Lieutenant Pierpont would have testified that the payments were made as a part of a witness protection program. This would have suggested to the jury that Epifanio needed to be protected from Carter. *See United States v. Davis*, 609 F. 3d 663, 696 (5th Cir. 2010) (finding that information about witness protection is not favorable to a defendant because the jury may have assumed that the witness needed protection from the defendant). However, for the reasons stated above, the evidence that the payments were part of a witness protection program is paper thin. And Officer Mack—the police officer assigned to monitor the Tovars—would have testified that the Tovars were never in any real danger. For these reasons, the Court concludes that the payments made by police on behalf of the Tovars constituted evidence favorable to Carter.

Evidence that police threatened the Tovars with arrest, deportation, and separation from each other and their son is impeachment evidence favorable to Carter. The threats created in the Tovars a motive to misrepresent or slant their testimony in ways favorable to the State.

Evidence that police coached Epifanio to not disclose the financial benefits and to say that Carter said “rape, break, and drive” is impeachment evidence favorable to Carter. This is so because (1) in directing a specific witness to withhold damaging evidence or give false

testimony, the police interfered with the truth-seeking function of the criminal justice process; and (2) the specific instances of coaching call into question the integrity of the police investigators and their investigation generally.

2. The evidence was suppressed by the State

The State did not disclose to Carter the financial benefits paid on behalf of the Tovars, the threats to arrest, deport, and separate the Tovars from each other and their son, or the coaching of Epifanio's trial testimony.

3. Prejudice ensued

For the suppression of evidence “to be prejudicial for *Brady* purposes, the [suppressed evidence] must be material.” *Tillman*, 2005 UT 56, ¶ 29. The materiality standard differs depending on the type of evidence suppressed.

If the prosecutor knowingly fails to disclose that testimony used to convict the defendant is false, “the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.” *United States v. Bagley*, 437 U.S. 667, 680. (1985). This is because “the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves ‘a corruption of the truth-seeking function of the trial process.’” *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976)). In other words, prejudice is presumed and is only rebutted if the State can show that failing to disclose the false testimony was harmless beyond a reasonable doubt.

For all other *Brady* violations—including when the defense makes no requests for discovery, makes only general requests for discovery, or makes specific requests for discovery that go unheeded—the materiality standard echoes that found in *Strickland v. Washington*: “The evidence is material only if there is a reasonable probability that, had the evidence been disclosed

to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Bagley*, 473 U.S. at 682. *But see Weary v. Cain*, 136 S.Ct. 1002, 1006 (2016) (“Evidence qualifies as material when there is ‘any reasonable likelihood’ it could have ‘affected the judgment of the jury.’” (quoting *Giglio*, 405 U.S. 150, 154 (1972) (emphasis added) (internal quotations omitted))).

When determining the materiality of suppressed evidence, the Court considers three principles. First, “whether in [the evidence’s] absence the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Tillman*, 2005 UT 56, ¶ 30. Second, “materiality . . . is not a sufficiency of the evidence test” and “not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury’s conclusions.” *Id.* ¶ 31 (quoting *Strickler*, 527 U.S. 263, 290 (1999) (internal quotations omitted)). Third, “the materiality of suppressed evidence must be evaluated in the context of the entire record. . . . Although a court may ‘evaluate the tendency and force of the undisclosed evidence item by item,’ it is the cumulative or collective effect of the evidence that is weighed when determining whether the disclosure would have created a reasonable probability of a different result. *Id.* ¶ 32 (internal citation omitted) (quoting *Kyles v. Whitley*, 514 U.S. 419, 436 & n. 10 (1995)).

For purposes of *Brady*, prejudice must be proved as “a demonstrable reality,” not as “a speculative matter.” *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (prejudice standard for ineffective assistance of counsel); *see also Banks v. Reynolds*, 54 F.3d 1508, 1519 (10th Cir. 1995) (“Our materiality review does not include speculation. The mere possibility that evidence is exculpatory does not satisfy the constitutional materiality standard.”) (cleaned up). Courts “do not, however, automatically require a new trial whenever ‘a combing of the prosecutors’ files

after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.” *Giglio v. United States*, 405 U.S. 150, 154 (1972) (emphasis added) (citation omitted).

The focus of *Brady* prejudice analysis encompasses the impact of the suppressed evidence would have had on trial strategy if disclosed. The Court must evaluate “how the defense's knowledge of the withheld information would have impacted not just the evidence presented at trial, but also the strategies, tactics, and defenses that the defense could have developed and presented to the trier of fact.” *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1353 (11th Cir. 2011).

Finally, “In evaluating [prejudice], it is necessary to consider all the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path.” *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam). Thus, the Court is required to “look back to what would have happened” at the petitioner’s “original trial, but . . . do it with the benefit of what we know thanks to the evidentiary hearing.” *Ross*, 2019 UT 48, ¶ 90. Failing to evaluate prejudice in light of all the known evidence “would improperly and artificially compartmentalize the inquiry.” *Id.* ¶ 92. Thus, the Court considers counter-factual proof the State would have offered at trial if the suppressed evidence had been disclosed. But the consideration of counterfactual proof is not an open door. The State is not permitted to scour its file for inculpatory evidence that is unrelated to the suppressed *Brady* material, and that the State never offered in the first instance at trial.

i. Carter was prejudiced in the guilt phase of the trial

Carter alleges four *Brady* violations: (1) failure to disclose the financial benefits paid to or on behalf of the Tovars by police; (2) failure to disclose police threats to arrest, deport, and

separate the Tovars from their son; (3) failure to disclose that police coached Epifanio to testify falsely about the financial benefits paid to or on behalf of the Tovars; and (4) failure to disclose that police coached Epifanio to testify falsely about Carter saying he was going to go “rape, break, and drive” before the murder. As to the first two violations, to prove materiality Carter must show a reasonable probability that if the evidence had been disclosed the result of the trial would have been different. As to the second two violations, materiality of undisclosed false testimony is presumed. The burden then shifts to the State to show that the failure to disclose is harmless beyond a reasonable doubt.

Evaluating the first two *Brady* violations in isolation and separate from each other, it would seem that Carter has failed to show a reasonable probability that disclosure of the financial benefits and threats would have resulted in a different verdict. At the evidentiary hearing, the Tovars testified about the financial benefits and threats, but nevertheless stood by their testimony that Carter had returned to their home and confessed to murdering the victim. The Tovars do not claim to have lied because of the financial benefits paid to them or because of the threats of arrest, deportation, and separation from their son. Moreover, the jury was aware that the Tovars were not legal residents of the United States. And Carter’s defense lawyer argued to the jury that Epifanio was not a citizen and was “desperate about staying in this country.” (1985 Trial Tr. pp. 1362, 1376).

But the Court does not determine the materiality of *Brady* violations as if the failures to disclose occurred in a vacuum. Rather, the materiality of suppressed evidence must be “evaluated in the context of the entire record. . . . Although a court may ‘evaluate the tendency and force of the undisclosed evidence item by item,’ it is the cumulative or collective effect of the evidence that is weighed when determining whether the disclosure would have created a

reasonable probability of a different result.” *Tillman*, 2005 UT 56, ¶ 32 (internal citation omitted) (quoting *Kyles v. Whitley*, 514 U.S. 419, 436 & n. 10 (1995)). Thus, the State’s failure to disclose the financial benefits and threats must be evaluated cumulatively with each other and in light of the other two *Brady* violations with which they are intertwined.

The other two *Brady* violations relate to the police coaching Epifanio to testify falsely about (1) having only received a \$14 witness fee prior to trial; and (2) Carter saying he was going to go “rape, break, and drive” before the murder. Both Watson and Lieutenant Pierpont knew that Epifanio’s testimony about only receiving a \$14 check from the City was false. Lieutenant Pierpont knew that Epifanio’s testimony about “rape, break and drive” was false, and his knowledge is imputed to Watson. The State knowingly failed to disclose that the testimony was false and coached by police. Carter’s conviction was secured—at least in part—on the basis of this false testimony. Therefore, the materiality of these non-disclosures is presumed and the burden shifts to the State to show that the failures to disclose were “harmless beyond a reasonable doubt.” The State has failed to meet this burden.

The State had no physical evidence placing Carter at the scene of the crime. The Tovars provided critical testimony about Carter’s whereabouts before and after the murder. Epifanio alone testified about what Carter admitted to him immediately after the murder. Together, the Tovars described for the jury Carter’s demonstration of what he had done. Importantly, this testimony corroborated Carter’s oral and dictated confession to Lieutenant Pierpont—a confession that, for the reasons stated by the Utah Supreme Court, may not have been able to stand on its own. *See Carter v. State*, 2019 UT 12, ¶ 95. Thus, the Tovars’ testimony was central to the State’s case against Carter.

Not surprisingly, Carter’s defense focused on Epifanio not being a credible witness.

Carter's counsel attacked Epifanio as a false witness on cross-examination, focusing on Epifanio's admitted lie about the location of the gun. Defense counsel returned to this theme in closing argument. Clearly, the persuasive quality of this defense strategy would have been significantly reinforced if the prosecutor had disclosed Epifanio's false testimony to Carter. The jury would have been informed that—contrary to his claim to have only lied one time (i.e. about the gun)—Epifanio had lied multiple times right there on the witness stand, under oath and before the jury, about facts material to his own bias and Carter's stated intent prior to the murder.

More damaging still, the jury would have learned that Epifanio perjured himself at the express direction of police. This would have undermined the integrity of both the police investigators and their investigation generally. Because Epifanio's coached false testimony was not disclosed, the jury was deprived of the opportunity to evaluate the credibility of Lieutenant Pierpont in light of his motive and apparent willingness to build a case against Carter by eliciting false testimony from a key witness for the prosecution. This suppressed evidence would certainly have called into question Lieutenant Pierpont's testimony about Carter's unrecorded oral confession, and the somewhat inconsistent written confession Lieutenant Pierpont dictated in his own words for Carter to sign.

The State argues that disclosure of the threats, financial benefits, and related coaching by police would have resulted in the introduction of damaging counter-factual proof. This argument is not persuasive. If evidence of the financial benefits and threats had been introduced, the State could have (1) introduced evidence about why police made the payments; and (2) introduced evidence of Epifanio's consistent statements made before any threats or payments were made to him. But the strategic decision to introduce this counter-factual proof would have come at significant cost.

Testimony about why the payments were made would have come from Lieutenant Pierpont. He would testify that the Tovars were part of a witness protection program. But this testimony would then have been revealed for what it was—a recent fabrication to explain away the payments. Lieutenant Pierpont’s claim that the payments had a legitimate protective purpose would have been further undermined by the fact that police had coached Epifanio not to disclose the payments. The State might have put on evidence that police paid for the Tovars to move to protect them from Carter. But at worst for Carter, this would have resulted in a dispute about who Epifanio feared more—Carter or the police. Evidence that Epifanio feared Carter would have been counter-balanced by persuasive evidence that Epifanio feared the police more. Evidence of Officer Mack’s and Lieutenant Pierpont’s specific threats of deportation—both to Epifanio and Perla—would have been introduced. And this would have further tarnished the integrity of the police investigators and their investigation generally.

Introducing Epifanio’s pre-motive consistent statements to Perla would have mitigated the argument that the financial benefits or threats caused Epifanio to fabricate his testimony. Many of these statements to Perla were generally consistent with Epifanio’s trial testimony implicating Carter. But again, introducing counter-factual proof through Perla would have come at a cost. Perla is an inconsistent, recalcitrant witness with a strong bias in favor of Carter. Her lack of memory—whether legitimate or feigned—and the cause of that memory loss would be placed in issue, as would the motives for her first statements to police. One reason Perla claims to lack memory is the trauma she experienced when police threatened to deport her and take her children away. Evidence of specific threats made to her by Lieutenant Pierpont and Officer Mack would be admitted, further tarnishing the police investigators and their investigation generally. These down-sides of presenting counter-factual proof raise serious questions about whether a

reasonable prosecutor would make the strategic choice to call Perla as a witness for this purpose.

Even if a prosecutor did make the strategic choice to call Perla, Epifanio's consistent pre-motive statements do not change the fact that the Tovars' testimony became more favorable to the State over time as payments were received, threats made, and coaching accomplished. Carter could have used the undisclosed financial benefits, threats, and coached false testimony to show that the Tovars' testimony was a work in progress, evolving over time to strengthen the State's case. *Cf. State v. Tillman*, 2005 UT 56, ¶ 87 (finding that undisclosed transcripts of interviews of the State's key witness would have shown that the witness's trial testimony was a "work in progress, carefully honed by the prosecution over the course of many months, and which only took its final shape mere days before trial" and that the defendant could have argued the witness's testimony was "forged in the heat of [the police] interrogations and was motivated by a desire to please the people who had granted her complete immunity").

Epifanio's testimony evolved over time to become more favorable to the State. Just days before trial he disclosed for the first time the location of the gun and Carter's directive to dispose of it in the river. At trial, notwithstanding the fact that more than \$4,000 had been paid on his behalf by police, Epifanio testified that he had only received a \$14 witness fee for his testimony. Finally, Epifanio testified at trial for the first time that Carter had expressed a desire to "rape, break, and drive" before the murder.

Lucia's testimony also evolved. Her preliminary testimony about Carter's demonstration included little detail. She testified that Carter lay on the floor and was "giving someone's hand on the back, and he was just doing something like moving his hand back and forth." (PH Trans. p. 54). When asked to demonstrate for the Court what she saw Carter doing, Lucia did so explaining that "[Carter] got up where he was sitting and he lay down on the floor. . . . He bent a

little bit and he put his hands on the back and he start moving his hand back and forth. He opened his legs and then he just bent more over.” (PH Trans. p. 55). In contrast, her trial testimony painted a far more sinister picture. At trial she testified that Carter “laid himself to the floor showing us exactly how he had forced this individual to lay down, and then he put his hands behind his back to illustrate how he had tied her hands behind her back.” (Tr. Trans. p. 1258). According to Lucia, Carter was “laughing and giggling” during the demonstration, which he gave not once but twice.¹⁰

The State’s argument that Watson corrected “rape, break, and drive” is also not persuasive. Watson’s questioning on direct elicited “rape, break, and drive” from Epifanio. Rather than confronting Epifanio with the falsity of the statement, Watson asked “And did [Carter] tell you that?” Epifanio then affirmed the false testimony answering, “Yes.” Watson in turn asked: “What’s your best recollection, Mr. Tovar, of what the defendant told you he was going to go do? Tell me what you remember him saying?” To this question, Epifanio answered “That he was going to break in a house.”

Eliciting this second statement about Carter’s intent to “break in a house” did not “remove any lingering misapprehension” the jury may have had about whether Carter actually said he was going to go “rape, break, and drive” before the murder. *See State v. Gordon*, 886 P.2d 112, 116 (Utah Ct. App. 1994). Indeed, jurors might have reasonably concluded that Carter made both statements. To correct false testimony, a prosecutor must take affirmative steps to remove any lingering doubts about whether the testimony is false. *Id.* at 117. (prosecutor who elicited false testimony about the time period during which victim saw defendant “removed any

¹⁰ In her first interview with Officer Mack on April 15, 1985, Lucia said that “while Carter spoke with her husband he was laughing.” (Exhibit 10, p. 1). At trial, Lucia testified that Carter was laughing during the demonstration. The nature and extent of that laughter had evolved too. By trial, Lucia reported that Carter had “laughed and laughed” and was “giggling” during the demonstration.

lingering misapprehension” about the false testimony by re-examining the witness and allowing him to clarify the correct time period); *United States v. Ramos-Carillo*, 511 F. App’x. 739, 741 (10th Cir. 2013) (prosecutor corrected false testimony of witness by “pressing the witness until he confessed his false testimony”); *United States v. Islam*, 786 F. App’x. 343, 344-45 (9th Cir. 2018) (prosecutor corrected false testimony by investigating the perjured testimony, providing a report of the investigation to the court, and participating in a bench conference to determine how to inform the jury and correct the record). Finally, the best indication that Watson failed to remove lingering doubt about whether Carter actually said “rape, break, and drive” is the 1992 sentencing prosecutor’s reliance on “rape, break, and drive” to secure Carter’s death sentence.

As explained above, prejudice to Carter must be evaluated in light of the fact that no physical evidence tied Carter to the crime scene. The State’s case rested on the confession, and the Tovars’ corroborating testimony. Carter’s theory was that Epifanio was lying and that Carter’s confession was coerced by unscrupulous police officers. In this context the failure to disclose that Epifanio lied about material facts under oath during trial and that he did so at the direction of the police was prejudicial to Carter’s defense.

In summary, the State has not shown that its failure to disclose Epifanio’s coached false testimony would have been “harmless beyond a reasonable doubt.” *United States v. Bagley*, 437 U.S. 667, 680. (1985). The State’s failure to disclose Epifanio’s false testimony and the coaching of that testimony by police was harmful to Carter. Carter’s defense turned on the theory that Epifanio was not a credible witness and a coerced confession. Evidence that police coached Epifanio to testify falsely would have significantly reinforced this theory, calling into question the credibility of Epifanio and the integrity of both the police investigators and their investigation.

When viewed cumulatively in the context of these failures to disclose false testimony, there is a reasonable probability that the State's failure to disclose the financial benefits and threats would result in a different outcome. Taken together and in light of the entire record, the four failures to disclose proved by Carter undermine this Court's confidence in the verdict.

For these reasons, the Court concludes that Carter has proved his conviction was obtained in violation of *Brady*.

ii. **Carter was prejudiced in the sentencing phase of the trial**

In determining whether the State's alleged *Brady* violations were prejudicial to Carter in the sentencing phase of the trial, the Court finds the case of *State v. Tillman*, 2005 UT 56, another death penalty case, particularly instructive.

In *Tillman*, the key witness against the defendant was his girlfriend, Carla Sagers, who was with him when he murdered the victim. At trial, Sagers testified that Tillman bludgeoned the victim twice with an axe and then set his bed on fire while he was still alive. Her testimony was the only evidence inculcating Tillman. Tillman was found guilty of the murder and sentenced to death. *Id.* ¶ 4.

Almost twenty years after the trial, Tillman discovered two partial transcripts of police interviews with Sagers. The interviews had been conducted prior to Tillman's trial and had never been disclosed to the defense. *Id.* ¶ 5. Although the transcripts contained evidence that was merely cumulative of evidence the defense possessed at the time of trial, the transcripts contained evidence not previously disclosed to Tillman. First, contrary to her trial testimony in which she expressed confidence about the timeline of events, the undisclosed transcripts showed that Sagers was unsure about the timeline of the murder mere days prior to trial. Second, in the undisclosed transcripts, Sagers mentioned that Tillman was feeling depressed and

suicidal—evidence that Tillman could have presented during the penalty phase of the trial as mitigation. Third, the undisclosed transcripts provide some evidence that the police officer interviewing Sagers coached her to tell a more believable story. Fourth, the undisclosed transcripts contained notations that Sagers laughed inappropriately throughout the interview.

The Utah Supreme Court evaluated the evidence cumulatively and determined that the suppressed evidence undermined its confidence in the jury’s death penalty verdict.¹¹ During the penalty phase of the trial, the State attempted to diminish Sagers’ moral culpability in the crime and argued that Sagers was one of Tillman’s victims. The undisclosed transcripts could have been used to undermine Sagers’ credibility by showing she exhibited inappropriate levity toward the crime, that her memory improved dramatically in a short period of time, and that a police officer encouraged her to craft a more believable narrative. “Tillman could have utilized this evidence to portray Sagers’s testimony as a work in progress, carefully honed by the prosecution over the course of many months, and which only took its final shape mere days before trial. The information contained in the suppressed transcripts would have helped Tillman advance the argument that Sagers’s testimony was forged in the heat of [the police] interrogations and was motivated by a desire to please the people who had granted her complete immunity.” *Id.* ¶ 87. In addition, Tillman could have taken advantage of evidence in the transcripts that he was depressed and suicidal to mitigate his penalty.

To support its evaluation, the Supreme Court noted that “the sentencing phase of a capital trial is not a scientific process, but rather requires the weighing of a multitude of both aggravating and mitigating factors.” *Id.* ¶ 91. Furthermore,

¹¹ In the district court, Tillman argued that his conviction and sentence should be vacated and he should be granted a new trial. The district court upheld his conviction but granted a new sentencing hearing. The State appealed the district court’s decision to grant a new sentencing hearing, but Tillman did not appeal the district court’s determination upholding his conviction.

imposing the death penalty on Tillman required a unanimous decision on the part of the jury. . . . Consequently, all that was necessary for Tillman to avoid the death penalty was a single doubting juror. If just one juror, while considering the aggravating and mitigating factors, had concluded that the death penalty was inappropriate under the circumstances, a punishment of life imprisonment would have been imposed. If the suppressed transcripts had been available to Tillman, he could have more effectively countered the prosecution's attempts to add Sagers to the list of his victims. That ability may very well have been the difference between life and death. . . . While the suppressed transcripts do not contain any earthshattering revelations, they do contain significant evidence that damages the credibility of the prosecution's star witness and undermines critical aspects of the prosecution's theory as to why the death penalty was justified in this case. We are not certain that the disclosure of the transcripts prior to Tillman's trial would have resulted in a different sentence. We are, however, compelled to conclude that there exists a significant possibility that Tillman would have achieved a more favorable sentence had the State fully complied with its constitutionally mandated disclosure obligations. That possibility undermines our confidence in the sentence imposed.”

Id. ¶ 92.

Here, the State failed to disclose that police coached Epifanio to testify falsely about Carter saying he was going to go “rape, break, and drive.” Lieutenant Pierpont knew this testimony was false, and his knowledge is imputed to the prosecutor. Watson failed to correct this false testimony. And the 1992 sentencing prosecutor relied heavily upon the statement in seeking a death sentence. In his closing arguments, the prosecutor made two references to the phrase “rape, break, and drive.” During his initial closing, he asked the jury to “[c]onsider the intent of the Defendant.” *Id.* at 1266. “He said why he was going out that night. He wanted money, he wanted to ‘rape, break, and drive.’ He wanted to hurt someone. He wanted to get something for himself. He went in there intending to do violence. And then he exposed and brutalized the woman.” *Id.* During rebuttal, the prosecutor returned to this theme, arguing that the killing was “not in retaliation to [Carter’s wife] or anyone else. He decided to go out and ‘rape and . . . break and drive.’” *Id.* at 1296.

Evidence that Carter, shortly before the murder, expressed a wanton desire to rape

someone, break someone or something, and flee may well have persuaded the jury that Carter was so culpable and dangerous as to require imposition of the death penalty. Said differently, had “rape, break, and drive” been excluded from the penalty phase, at least one juror may have been persuaded that Carter was less morally culpable and did not deserve to die for his crime.

The State has failed to prove that its failure to disclose this false testimony was harmless beyond a reasonable doubt. For this reason, the Court concludes that Carter’s death sentence was obtained in violation of *Brady*.

b. Relief under the Post-conviction Remedies Act

In most cases, the PCRA requires that the person challenging his conviction or sentence prove that “there would be a reasonable likelihood of a more favorable outcome, in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.” Utah Code § 78B-9-104(2)(a). Unless this standard is met, the Court “may not grant relief from [the] conviction or sentence.” *Id.* This is the legal standard that applies when the petition alleges the failure to disclose *Brady* material.

For the reasons stated above, the Court concludes that—had the State disclosed to Carter the financial benefits paid on behalf of the Tovars, the police threats of arrest, deportation, and separation, and the coaching of Epifanio’s false testimony by police—there would have been a reasonable probability of a different verdict in both the guilt phase and the sentencing phase of Carter’s trial. The Court’s confidence is undermined in both Carter’s conviction and sentence.

7. Discussion of Claims 3 and 4: Violations of *Napue v. Illinois*

a. The State’s failure to correct Epifanio’s false testimony violated *Napue*.

“[D]eliberate deception of a court and jurors by the presentation of known false evidence

is incompatible with ‘rudimentary demands of justice.’” *Giglio v. United States*, 405 U.S. 150, 153 (1972). “The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959).

“When a prosecutor is aware that testimony is false, he or she has a duty to correct the false impression; failure to do so requires reversal ‘if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury.’” *State v. Gordon*, 886 P.2d 112, 115-16 (Utah Ct. App 1994 (quoting *State v. Walker*, 624 P.2d at 690)). This applies “even where the false evidence goes only to the credibility of the witness.” *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This is because the jury’s “estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.” *Id.*

To prove a *Napue* violation, Carter must show that the prosecutor knowingly failed to correct false testimony, and that this failure could have resulted in a different outcome. This standard is less demanding than the materiality standard for *Brady* violations, and there is a good reason for that. See *United States v. Garcia*, 793 F.3d 1194, 1207-08 (10th Cir. 2015). “A prosecutor’s knowing use of perjured testimony is misconduct that goes beyond the denial of a fair trial, which is the focus of *Brady*. It is misconduct that undermines fundamental expectations for a ‘just’ criminal-justice system.” *Id.*

During the cross-examination of Epifanio, defense counsel asked, “[D]id you and or your family anytime between February and now receive any money or support from [the prosecutor’s] office or from Mr. Pierpont, the police?” Epifanio responded that he and his wife had received

checks for \$14. In the questioning that followed, Epifanio doubled-down, lying four more times about not receiving any other financial benefits. Watson and Lieutenant Pierpont both knew that this testimony was false and Watson did nothing to correct it.

Lieutenant Pierpont coached Epifanio to falsely testify that Carter expressed intent to go “rape, break, and drive” prior to the murder. Lieutenant Pierpont knew this testimony was false. Because Lieutenant Pierpont was a member of the prosecution team, his knowledge of false testimony is imputed to Watson, the prosecutor.¹² See *Tillman*, 2005 UT 56, ¶ 27 (citing *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). As explained above, Watson’s subsequent questioning of Epifanio did not correct this false testimony.

For the reasons stated above, the Court concludes that the State’s failure to correct Epifanio’s coached false testimony could have resulted in a different outcome both in the guilt phase and sentencing phase of Carter’s trial. The Court’s confidence in both the conviction and the sentence has been undermined.

b. Relief Under the Post-Conviction Remedies Act.

Where a person “challenges [his] conviction or the sentence on grounds that the prosecutor knowingly failed to correct false testimony at trial or at sentencing,” the person must “establish[] that the false testimony, in any reasonable likelihood, could have affected the judgment of the fact finder.” Utah Code § 78B-9-104(2)(b).

Watson knowingly failed to correct Epifanio’s false testimony—both as to the financial benefits paid on behalf of the Tovars and the assertion that Carter expressed intent to go “rape,

¹² For purposes of *Brady*, a police investigator’s knowledge of exculpatory evidence is imputed to the prosecutor. See *Tillman*, 2005 UT 56, ¶ 27. There is no reason why this same principle should not apply when a police investigator coaches a prosecution witness to testify falsely. The investigator is a member of the prosecution team, and his knowledge of the false testimony is properly imputed to the prosecutor. To rule otherwise would permit the State to obtain a conviction based on false testimony elicited by a member of the prosecution team, and then avoid reversal by asserting the prosecutor’s ignorance. Such willful ignorance is no defense in the context of *Brady*, and it should have no traction in the context of *Napue*, where the misconduct of State actors is intentional and undermines the truth-seeking function of trial.

break, and drive” before the murder. For the reasons stated above, there is a reasonable likelihood that this false testimony could have affected the judgment of the jury in the guilt phase of the trial. For the reasons stated above, there is a reasonable probability that the State’s failure to correct Epifanio’s false testimony about “rape, break, and drive” could have affected the judgment of the jury in the penalty phase. For these reasons, the Court’s confidence is undermined in both Carter’s conviction and sentence.

8. Remaining Arguments Presented

The Court has considered all remaining substantive and procedural arguments presented by the State and concludes that they are without merit.

ORDER

For the forgoing reasons, the Petition for Post-Conviction Relief is GRANTED. Carter’s conviction and death sentence are vacated in the matter of *State v. Carter*, Fourth District Court Case No. 851497071.

Pursuant to section 78B-9-108(3)(a), this ORDER is STAYED for 5 days. During that time, the State shall give written notice to the Court and to Petitioner whether it will appeal the order or take no action. If the State fails to respond, the Court will lift the STAY and set the matter for the appointment of counsel in the criminal case. If the State appeals the Court’s decision, the STAY will remain in place during the pendency of the appeal.

This is the FINAL ORDER of the court for the matters addressed herein. No further order is required.

DATED this 23rd day of November, 2022.

/s/ Derek P. Pullan



JUDGE DEREK P. PULLAN

Fourth District Court

Addendum C

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

DOUGLAS STEWART CARTER, Plaintiff, v. STATE OF UTAH, Respondent.	<u>RULING AND ORDER</u> GRANTING PETITIONER’S MOTION TO AMEND THE PETITION TO CONFORM TO THE EVIDENCE Case No. 150400825 Judge Derek P. Pullan
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Petitioner Douglas Stewart Carter (hereinafter “Carter”) raised two claims in his Petition for Post-conviction Relief. The first claim is that the State committed a *Brady* violation by failing to disclose all the benefits Epifanio and Lucia Tovar received from the government and failing to disclose that the Tovars’ testimonies were coached before trial. The second claim is that the State committed a *Napue* violation when the prosecutor knowingly elicited false testimony from Epifanio—specifically, that he was only paid a witness fee for appearing in court, and received no other gifts or benefits from the government.

After the evidentiary hearing in November 2021, the parties filed briefs in support of their claims and defenses. In his opening brief, Carter made two arguments now at issue. First, Carter argued that during his criminal trial, the prosecutor failed to correct some additional false trial testimony not referenced in Carter’s Petition. Specifically, at Carter’s 1985 criminal trial Epifanio testified that on the evening of the murder but before the murder was committed, Carter had said he was going to go “rape, break, and drive.” At the evidentiary hearing in this case, Epifanio testified that Carter did not in fact make this statement, and that Epifanio only attributed

the statement to Carter because that is what the police and prosecutor wanted Epifanio to say. Second, Carter argued that the State failed to disclose to defense counsel that that Epifanio's trial testimony about "rape, break, and drive" had been coached by the prosecutor and/or police.

In its opposing memorandum, the State argued that Carter's claim related to "rape, break, and drive" as false testimony was not raised in the original Petition. In the alternative, the State argued that the claim is procedurally barred by the Post-conviction Remedies Act (hereinafter "PCRA").

Following oral argument on June 9, 2022, Carter moved under Rule 15(b) of the Utah Rules of Civil Procedure to amend his Petition to conform to the evidence. Carter contends that the issue of the State presenting the false "rape, break, and drive" testimony was tried by implied consent as both an additional *Napue* and *Brady* claim. *See* Docket no. 687. The State filed an opposition, and Petitioner filed a reply. *See* Docket nos. 690 and 692. Neither party requested oral argument.

The Court concluded that it could not reach the merits of the Petition until this dispute about the scope of the proceedings was resolved. Therefore, the Court took Carter's Motion to Amend the Petition under advisement. Having now considered the papers and the arguments of the parties, the Court GRANTS Carter's Motion to Amend.

1. Carter's Motion to Amend His Pleadings to Add a *Brady* Claim is GRANTED

Carter moves to add a claim that Epifanio was coached to say Carter was going to "rape, break, and drive" before the murder and the State failed to disclose the coaching. Carter contends that this *Brady v. Maryland* claim was tried by consent. In its memorandum, the State did not oppose amending the Petition to add this claim.¹ Carter's motion to amend the Petition to add this

¹ Petitioner's original petition claims that the State coached the Tovars' testimonies. In the recent Utah Supreme Court opinion reversing the district court's granting of summary judgment, the Utah Supreme Court noted that

claim is GRANTED.

2. Carter's Motion to Amend His Pleadings to Add a *Napue* Claim is GRANTED

a. Procedural History and Evidence Supporting the New Claim

During Carter's 1985 criminal trial, prosecutor Wayne Watson asked Epifanio what Carter told him the night of the murder, before the murder occurred. Epifanio testified that Carter told him he was going to "rape, break, and drive." This phrase was repeated during the 1992 penalty phase of the jury trial. There, during closing argument, the prosecutor relied heavily on the "rape, break, and drive" statement to support the State's argument that the death penalty should be imposed. At the conclusion of the 1992 penalty phase, Carter was again sentenced to death.

Years later, Carter initiated this PCRA case by filing his Petition. The parties conducted discovery. During discovery Carter deposed Lieutenant George Pierpont. Pierpont's deposition took place on February 11, 2020. The State appeared at the deposition and lodged objections, but did not examine Pierpont. During the deposition, the following exchanges occurred between Carter's counsel and Pierpont:

Q. So, Epifanio Tovar testified at trial that Mr. Carter told him he was going to, quote, "rape, break and drive," before he left the Tovar house to go commit the crime. Is it fair that that's nowhere in Epifanio's signed statement?

A: I - - I don't know that those exact words that you just used are all in there. I think the statement says he's going to go out and steal money.

Q. Right.

A. Yeah. Okay.

Q. Okay. As far as you recollect, he did not tell you that Mr. Carter had expressed the intent to commit a premeditated rape or sexual crime?

Epifanio's testimony that Carter said he was going to "rape, break, and drive" was a change from his earlier statements and suggested the phrase may have been coached by the State. *See Carter v. State*, 2019 UT 12, ¶ 67.

A. Did he tell me that?

Q. Yeah. Epifanio.

A. Tovar? Yeah. I think he did at one time tell me that's what he was -- at one time he said -- probably said those words to me. It's just not in the statement that way.

Q. Okay. We have a transcript of your interrogation.

A. Okay.

Q. Did you have communications with Mr. Tovar outside of that, you know, what would have been recorded in that transcript?

A. Not that I recall.

Q. Okay. So, I mean, I have the transcript here. You're welcome to look through it. It's a lot of pages. At least from my review, nowhere in there did he say that Mr. Carter said he was going to go commit a rape before he left the house the first time. Are you saying that you believe that that would be contained in that transcript?

A. I'm not sure.

Q. Okay. That's a pretty important statement, though, right? Premeditated intent to commit a sex crime, especially in this case, would have been something that you would have memorialized in his signed statement?

A. I guess I'm going to have you ask the question -- I don't know if I'm understanding what you're asking me.

Q. Sure. If Epifanio told you during his interrogation

A. Okay.

Q. that Mr. Carter said he was going to commit a rape, you would have had that statement be part of the signed statement that you had Epifania sign?

A. I may have -- I may or may not have put it in there. I -- I don't think there was any rape that was committed. I think that Carter brought out that he thought about raping her or had her take her pants down and whatever. But, quote, "she was on the rag," and so he didn't.

Q. Okay.

A. I think that's clear in the reports and whatever, . . .

Q. And for the record, this is Deposition Exhibit 7. The second paragraph of this statement references the first time that Mr. Carter was at the Tovar home; is that fair?

A. Starting with what?

Q. On February 27, 1985.

A. Okay.

Q. Is it fair to say that nowhere in there does it say anything about Mr. Carter telling Epifania that he was going to go commit any sort of sex crime?

A. Not a sex crime. No.

Q. Okay. And is it fair to say that -- actually, I'm just going to read this. "On February 27, 1985, at about 7: 30 p. m., Doug Carter was at my apartment located at 461 South 500 East, Provo. He brought up in our conversation that he was going to go out and steal some money. He did not tell me where he was going to go or where he was going to get the money. I know that Doug has broken into cars before to try and get money. Doug left my apartment at about 7:45, and I did not see him again until about 9:30 to 9:45 the night of February 27, 1985." Did I read that accurately?

A. Yes.

Q. Okay. Fair to say that he didn't say anything about breaking into any houses, right?

A. No.

Q. And he didn't say that Doug said that he was going to go, quote, "rape, break, and drive"?

A. No.

Pierpont Depo., pp. 53-58, of 129

Q. Okay. Obviously, Mr. Carter did not say that he had intended to, quote, "rape, break, and drive," when he confessed to you, right?

A. I don't recall if those words were used or not.

Q. Okay.

A. I think those words came from either the Tovars or Perla or somewhere.

Q. Right. And we talked about that that's what Epifania testified to at trial, that Mr. Carter had told him he was going to, quote, "rape, break, and drive. But that wasn't contained in -- during the recorded interview or the signed statement that you got from Epifania Tovar?

A. No.

Q. Okay. So there seems to be a conflict there between what Mr. Carter allegedly told you and what Mr. Tovar testified to at trial?

A. There's no conflict in my mind.

Q. Okay. But it is fair to say that nothing in Mr. Carter's signed statement references rape or anything related to any sort of sexual aspect of the crime?

Pierpont Depo., pp. 102-103, of 129.

One month after deposing Pierpont, Carter's counsel deposed Epifanio. Carter's counsel asked Epifanio whether his testimony about Carter saying "rape, break, and drive" before the murder was true. Epifanio responded "no." Epifanio then explained that he only said "rape, break, and drive" because "that's what they wanted me to say." Exhibit 1, Evid. Hr'g, at 26. When asked who told him to say the phrase, Epifanio responded, "The police department. . . . I think it was Pierpont." When asked whether the prosecutor may have told him to say the phrase, Epifanio responded, "It would have been either of the two. Pierpont or the prosecutor. I don't recall." *Id.* at 28. Epifanio also testified that Watson was in the room when the phrase "rape, break, and drive" was raised. *Id.*

Epifanio testified he lied about Carter saying "rape, break, and drive" because he was afraid of being charged as an accomplice, being deported, and having his son taken away from him. *Id.* at 35. He also testified that "they pushed me to say that." *Id.* at 94.

During cross-examination, the State asked the following questions:

Q In your April declaration, you say that when Lieutenant Pierpont was interviewing you, it seemed like he wanted to lead you and have you agree on things that did not happen, did you -- agree to anything that did not happen?

A: Yes.

Q: What?

A: Such as the -- such as the rape, break and drive

Q: But in the interview with Lieutenant Pierpont was recorded, right?

A: I don't recall.

Q: Didn't you just say you reviewed that?

A: On paper

Q: And Lieutenant Pierpont never said "rape, break and drive" in that interview, did he?

A: I don't recall.

Exhibit 1, at 50 -51.

Finally, during discovery in the PCRA case Carter's counsel deposed Watson, the trial prosecutor. But this deposition was conducted on November 1, 2016, more than three years before Pierpont and Epifanio were deposed in 2020.

The early deposition of Watson preserved his testimony as he passed away two years later in late 2018. But the deposition occurred before Epifanio had affirmed under oath that "rape, break, and drive" was a fabrication coached from him by police or the prosecutor. The State appeared at the deposition and lodged objections, but did not examine Watson. Watson was not asked whether he told Epifanio to say "rape, break, and drive." He was not asked whether he was ever in the room when anyone else told Epifanio to say "rape, break, and drive."

During the Watson deposition, the following exchanges took place between Watson and Carter's counsel without objection from the State:

Q. Okay. In your experience, what kind of interaction is there between law enforcement and key witnesses prior to the trial?

A. Not that much. We would call them into the office, and depending on their age, we might even take them to the courtroom, if they were a child of young age, less than 10 maybe, let them sit in the witness chair and so forth. But other than that, we would say to them, repeatedly, just answer the question, and just tell the truth no matter what.

Exhibit 4, at 41-42.

Q. Given your normal practice in a case of this magnitude, how often would you have met with the witnesses prior to their testimony?

A. The magnitude of the case doesn't make any difference because in my situation, I don't have any purpose to meet with them other than, tell the truth and wait for an objection, or listen for an objection from me before you answer. And that's it.

Q. So you personally prepped your own witnesses then?

A. I didn't prep them at all, other than tell the truth.

Q. Okay. So you would never have spoke to a witness before them getting on the stand at all?

A. Well, I would often, depending on the witness, elderly people, people that are scared out of their wits, children.

Q. Okay. So what did that preparation look like?

A. Hi. I'm Wayne Watson. I am the prosecutor. You ever seen a courtroom? Well, on TV, yeah. Okay. 2 That's what it looks like. I want to tell you what to say from the witness stand. Is that okay with you? And they look at me kind of funny, and I say, "Tell the truth."

Q. And then you would go over kind of the questions you were going to ask?

A. Not really. I would ask them what happened or what did they see or what, you know.

Q. Was it possible at times that law enforcement would go over prior statements with the witness to prep them?

A. No. They knew from the point they declared them witnesses, they were the county attorney's witness and you don't mess with them.

Q. Okay. Given the language barrier with the Tovars, how would you have handled that in terms of preparing them as witnesses? Obviously, they would be more like an elderly person or child in terms of, that would be pose a problem.

A. Their testimony was, after the homicide, Carter comes to Tovars' house.

Q. I'm sorry. I'm going to stop you here because that wasn't my question. Because of the language barrier, how would you have handled that in terms of preparing them as witnesses?

A. I am telling you. I am answering that.

Q. Okay.

A. Okay. After the homicide, Carter went to Tovars', Epifanio's house. He jumped on the couch and said, "Put on the news. Put on the news." They looked at him kind of funny, and he said, "Put on the news." So they turned the news on, and there was the police in the Provo case. Picture of the house. Talk about the homicide. You know, the lady was shot in the head. They didn't go into details about her rape or her treatment. And then according to Tovars, he didn't say anything about it. You are figuring that the next thing out of his mouth is going to be, "Yeah, I did that." He didn't say anything. That's all he was going to testify. Edwards comes to my -- or Carter comes to my house, jumps on the couch and says, "Turn on the news." That was their testimony. There wasn't any need to talk to them or refresh it or whatever.

Q. So you are saying that they didn't actually hear Carter confess other than to say, "Turn on the TV"?

A. That's my recollection, yes.

Id. at 52-54.

Q. Okay. Can you think of other attorneys, paralegals, law enforcement, support staff who we haven't talked about today who may have interacted with the Tovars?

A. No.

Q. Okay. So who would have had contact with them prior to trial after Carter was arrested and they were identified as suspects within the prosecutor's office?

A. Nobody that I know of.

Q. Okay. So who -- say, you know, you were going to prepare them to testify. You needed a translator there to help you. Would that have been Richard Mack, you think, now knowing that he --

A. No. I don't recall ever preparing them other than maybe the day of the trial.

Q. Okay. Because of the language barrier, would it be possible that things were conveyed to them by law enforcement or the interpreter that you had no knowledge of?

A. No. Well, no. Anything's possible.

Q. Okay.

A. But no, not that I know of.

Id. at 57.

The evidentiary hearing in this PCRA case was held in November 2021. At the hearing, the Court admitted into evidence transcripts of Watson's and Epifanio's depositions. The State called Richard Mack as a witness. Mack testified:

Q. STATE: Did you ever meet with either or both of the Tovars together with Wayne Watson?

A. It would be understandable to do that before any -- kind of like pretrial arrangements and preparations, but I do not recall that.

Q. Did you ever discuss before trial -- at any time before the trial, did you ever discuss the Tovars' trial testimony with them?

A. Did I discuss pretrial preparations of testimony with the Tovars? I'm sure I did because they would have needed an -- an interpreter, but I don't recall it.

Q. You didn't -- you didn't interpret at trial, though, just to be clear?

A. I did not.

Q. Did you ever coach Epifanio what to say in his trial testimony?

A. Absolutely not.

Q. Did you ever coach Lucia Tovar what to say in her trial testimony?

A. Absolutely not.

Evid. Hr'g Trans., Nov. 16, 2021, at 143-44.

At the evidentiary hearing, the State also called Pierpont. Pierpont testified:

Q STATE: It's rape, break and drive. I want -- I want to talk about rape, break and drive, and I -- and he has to say whether he remembers it. . . . Do you recall at trial that Mr. Tovar said the first time Mr. Carter came to the home and then left, Mr. Tovar said that Mr. Carter said he intended to rape, break and drive? Do you remember that testimony?

A: At trial?

Q: Yes

A: Yes

Q. Had you heard this before, that exact phrase, "rape, break and drive"?

A. I don't recall that I heard it before. I think what I recall is that Mr. Carter was going to go out and steal.

Q. When you say that's what you recall, are you saying you recall that from your own memory, or is that something Mr. Tovar told you?

A: That's what Tovar told me.

Q. Okay. So you do not recall Mr. Tovar ever saying the phrase "rape, break and drive" before his trial testimony?

A. Not before.

Q. All right. Did you -- did you give that phrase to Mr. Tovar?

A. No.

...

Q. Did you ever tell Mr. Tovar to -- to inculcate Mr. Carter in any sex crime intention?

A. I think it came up in the interview that -- trying to answer your question. It came up in the interview that Ms. Olesen's pants were taken down, and in that interview he told me that -- I think it was the next day that Mr. Carter told him that he did not rape Ms. Olesen because she was on the rag.

Q. Okay. But beyond -- beyond this statement that he did not rape Ms. Olesen, did you ever tell Mr. Tovar to say that Mr. Carter did intend to commit a sex crime?

A: No.

Evid. Hr'g Trans. Nov. 18, 2021, at 55-57.

b. Arguments of the Parties

Carter moves to add a claim under *Napue v. Illinois* that Watson knowingly elicited and failed to correct Epifanio's false trial testimony that Carter said he was going to "rape, break, and drive" prior to the murder. Carter argues the State impliedly consented to the amendment because it failed to object to Epifanio's March 2020 deposition testimony that he was lying about

“rape, break, and drive.”

The State concedes it did not object to the introduction of the evidence, but argues that the reason for not objecting was because “rape, break, and drive” was directly related to (1) Carter’s *Brady* claim that Epifanio’s testimony was coached; and (2) Carter’s claim that he was prejudiced by that coached testimony. The State further argues that allowing the amendment now would prejudice the State. This is so for two reasons. First, the State did not have an opportunity to ask Watson about whether he knew “rape, break, and drive” was false testimony, or whether Watson told Epifanio to say it. Second, the State did not have an opportunity to question the 1992 sentencing prosecutor about whether he knew “rape, break, and drive” was false testimony. Finally, the State argues Carter’s motion is procedurally deficient because he failed to attach a copy of the proposed amended petition.

In reply, Carter argues that whether the phrase “rape, break, and drive” was false “has always been central to [his] claims.” Reply, at 2. The phrase was relied on by the Utah Supreme Court in its remand decision to illustrate how testimony evolved over time and could have been coached by the State. *See Carter v. State*, 2019 UT 12, ¶ 67. The State had every incentive to ask Watson whether he knew the phrase was false and whether he told Epifanio to say it at trial. And, according to Carter, whether the 1992 sentencing prosecutor knew the “rape, break, and drive” was false is not relevant to Carter’s claims. Finally, Carter argues that attaching the proposed amended petition is only required for amendments made before trial.

c. Legal Standard

Rule 15 of the Utah Rules of Civil Procedure

When an issue not raised in the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment-- to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to

amend does not affect the result of the trial of that issue.

Utah R. Civ. P. 15(b)(1).

“Although an unpleaded issue ‘must’ be treated as if raised in the pleadings if the issue was tried by consent, the determination of whether the issue was tried by consent ‘is highly fact intensive’ and the district court has a ‘fairly broad measure of discretion in making that determination.’” *Win-Win Invs. LLC v. Dutson*, 2021 UT App 18, ¶ 20 (quoting *Pilot v. Hill*, 2019 UT 10, ¶ 9, 437 P.3d 362 (cleaned up)).

“In determining whether an unpleaded issue has been tried by implied consent, the court must consider whether the opposing party had ‘adequate notice’ of the issue ‘and an opportunity to meet it.’” *Id.* (quoting *Colman v. Colman*, 743 P.2d 782, 785 (Utah Ct. App. 1987)).

In order to amend pleadings to conform to the evidence based upon implied consent, the evidence supporting the amendment must be introduced without objection, “‘where it appear[s] that the parties understood the evidence [is] to be aimed at the unpleaded issue.’” *Hill v. Est. of Allred*, 2009 UT 28, ¶ 48 (quoting *Colman v. Colman*, 743 P.2d 782, 785 (Utah Ct.App.1987)). If the evidence is relevant to a *pleaded* issue, then the issue is tried by consent only if “the party against whom the amendment is urged [has some] reason to believe a new issue is being injected into the case.” *Id.* (quoting *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 105 (Utah 1998)). Finally, “‘the opposing party [must have] had a fair opportunity to defend and . . . offer additional evidence if the case were [retried] on a different theory.” *Id.* “Application of rule 15(b) is not appropriate when an issue is ‘tried inadvertently.’” *Berg v. Berg*, 2012 UT App 142, ¶ 5 (quoting *Lee v. Sanders*, 2002 UT App 281, ¶ 7).

d. Conclusions of Law

The State did not have reason to object to Epifanio’s deposition testimony that “rape,

break, and drive” was a coached fabrication. This testimony was relevant to Carter’s pled *Brady* claim—that the State coached Epifanio’s testimony and that Carter was prejudiced as a result. Moreover, the Utah Supreme Court in its remand decision specifically referenced “rape, break, and drive” as potentially coached testimony prejudicial to Carter’s case.

Because the “rape, break, and drive” evidence is central to the pleaded *Brady* claim and the prejudice that may have ensued, the question before the Court is whether the State had any reason to believe that Epifanio’s “rape, break, and drive” testimony was also being elicited to support an unpleaded *Napue* claim. Based on the totality of the facts and circumstances presented, both during discovery and at the evidentiary hearing, the Court concludes that the State did have reason to believe that this unpleaded issue was being injected into the case.

From the beginning, Carter’s Petition included a general allegation that the Tovars’ trial testimony had been coached. Allegations that a trial witness has been improperly coached naturally give rise to both *Brady* and *Napue* claims under the PCRA. The *Brady* claim rests on the State’s failure to disclose the improper coaching. The *Napue* claim rests on the prosecutor knowingly presenting the false testimony derived from that coaching. The objective of improper coaching is that the witness testifies falsely, or testifies in a way that creates a false or misleading impression. Where this objective is achieved and the desired false testimony is presented at trial, the resulting PCRA claim grounded in these facts will always include a *Napue* violation.

Epifanio affirmed in his deposition that the phrase “rape, break, and drive” was a fabrication coached by either Pierpont, Watson, or both. The State knew that Epifanio had testified at trial about Carter saying “rape, break, and drive.” The State knew that Watson had elicited this testimony on direct examination. By definition, the coaching of a trial witness is intended to elicit from that witness false or misleading testimony. And that inescapable nexus

gave the State adequate notice that a new *Napue* claim had been injected into this case.

The State's conduct during discovery and the evidentiary hearing demonstrates that the State had both notice of and a fair opportunity to meet Carter's unpleaded *Napue* claim. In Pierpont's deposition, Carter's counsel laid the foundation for "rape, break, and drive" being Epifanio's recent fabrication at trial. Carter emphasized that Epifanio had not, during his initial interrogation by Pierpont, made any reference to Carter saying "rape, break, and drive" before the murder. During Watson's deposition, Carter's counsel asked Watson how he prepared trial witnesses, including the Tovars, to testify and what he told trial witnesses to say. The State had a full opportunity to inquire further, but asked no questions—apparently satisfied with Watson's testimony that the only thing he told trial witnesses was to tell the truth. At Epifanio's deposition, Carter's counsel—without objection from the State—elicited the testimony that "rape, break, and drive" was false testimony coached by either Pierpont, Watson, or both. The State had a full and fair opportunity to respond to the allegation that coaching had occurred and that the coaching had achieved its intended effect—namely, the prosecutor eliciting the coached fabrication from the witness at trial. Finally, at the evidentiary hearing the State called both Pierpont and Mack and asked them questions about whether either of them had coached Epifanio to say "rape, break, and drive" at Carter's trial.

The State argues that if it had known about Carter's unpleaded *Napue* claim, it would have deposed or called at the evidentiary hearing the 1992 sentencing prosecutor to testify about whether he knew the phrase "rape, break, and drive" was coached and untrue. But the State has not shown how the 1992 sentencing prosecutor's knowledge is relevant to the *Napue* claim. And Carter has conceded that the 1992 sentencing prosecutor's knowledge is irrelevant to that claim.

In conclusion, the State was on fair notice that Carter's Petition included a general

allegation that the Tovars' testimony included coached fabrications. That general allegation was fleshed out in discovery, Epifanio disclosing in his deposition that "rape, break, and drive" had been a lie, coached from him by the police and/or prosecutor. During discovery, the State had a fair opportunity to investigate, gather evidence, and rebut this *Napue* claim, notwithstanding Carter's failure to expressly plead it. Finally, at the evidentiary hearing the State "actively defended" against the claim. *See Guss v. Cheryl, Inc.*, 2010 UT App ¶ 14-18 (affirming the district court's finding of implied consent where the opposing party "actively participated in a trial that focused in a significant way on an unpleaded issue).

For these reasons, the Court concludes the parties tried by implied consent Carter's unpleaded *Napue* related to "rape, break, and drive." Therefore, amendment of the Petition to include the claim is proper. For the reasons set out in Carter's memoranda, the State's contention that Carter's Motion to Amend the Petition is procedurally flawed is without merit.

ORDER

For the forgoing reasons, Carter's Motion to Amend the Petition is GRANTED. This is the order of the court for the matters addressed herein. No further order of the Court is required.

DATED this 25th day of August, 2022.

/s/ Derek P. Pullan



JUDGE DEREK P. PULLAN
Fourth District Court

Addendum D

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

DOUGLAS STEWART CARTER, Plaintiff, v. STATE OF UTAH, Respondent.	<u>RULING AND ORDER</u> ON STATE’S PARTIAL OBJECTION TO WAYNE WATSON’S DEPOSITION Case No. 150400825 Judge Derek P. Pullan
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On July 15, 2021, Petitioner Douglas Stewart Carter (“Carter”) moved to admit the deposition of Wayne Watson at trial under Rule 32 of the Utah Rules of Civil Procedure. (Docket no. 543). The State did not oppose Carter’s motion under rule 32. However, on July 28, 2021, the State raised objections to portions of the deposition transcript. (Docket no. 550). Carter filed a reply on August 4, 2021. (Docket no. 562). The parties met for oral argument on October 25, 2021. During oral argument, the State requested an opportunity to brief whether any exceptions to the law of the case doctrine apply. The State filed its supplemental brief on November 1, 2021, and Carter filed a response on November 8, 2021.

Having considered the papers and the arguments of the parties, the Court SUSTAINS in part and OVERRULES in part the State’s objections.

1. Procedural History and the Mandate Rule

In response to Carter’s Petition for Post-conviction Relief, the State filed a Motion for Summary Judgment. In its motion, the State raised several objections to portions of Wayne Watson’s deposition testimony. The prior judge on this case issued a ruling on May 15, 2017,

and either sustained or overruled each of the State's objections. (Docket no. 217). In addition, the prior judge sustained the State's objections to exhibits 16-19, documents that were used to impeach Watson's testimony. The prior judge found that there was a genuine issue of material fact with regard to whether Wayne Watson knowingly suppressed financial benefits provided to two of the State's witnesses and knowingly failed to correct false testimony at Carter's criminal trial. Ultimately, however, the prior judge granted summary judgment on behalf of the State because Carter's claims failed to satisfy the materiality standard as set forth in the Post-conviction Remedies Act.

Carter appealed the decision. *See Carter v. State*, 2019 UT 12. In discussing the objections to the Wayne Watson deposition, the Utah Supreme Court wrote:

Carter deposed Wayne Watson, the Utah County prosecutor in the original trial, as part of this post-conviction appeal. The State argued below that portions of the deposition and exhibits 16-19 attached thereto were inadmissible. The district court sustained the objection with respect to certain portions of the deposition transcript and with respect to exhibits 16-19.

On appeal, Carter recognizes that this evidence is not at issue in this appeal because the district court found a genuine issue of material fact exists regarding whether Mr. Watson suppressed financial benefits received by the Tovars and knowingly failed to correct false testimony. Accordingly, Carter has not provided briefing arguing that we should reverse the district court's ruling on this evidence. Because Carter has not briefed the issue, we do not reach it and we affirm the district court's holding with respect to this evidence.

Id. ¶¶ 164-65.

The State argues that when the Utah Supreme Court ruled that it “affirm[ed] the district court’s holding with respect to this evidence,” the Supreme Court affirmed the district court’s rulings as to each of the State’s objections on the merits. Carter, on the other hand, emphasizes the Supreme Court’s explanation that because Carter did not brief the evidentiary rulings “we do not reach it.” In other words, according to Carter, the Utah Supreme Court merely affirmed the

district court's finding¹ that there is a genuine dispute of material fact about whether there is a *Brady* or *Napue* violation. In Carter's view, the Supreme Court offered not determine whether the district court's evidentiary rulings relating to the Watson deposition were correct.

Resolving this question about the scope of the Supreme Court's decision is important in understanding both the scope of the mandate rule and how that rule applies to the prior judge's evidentiary rulings.

The "[l]aw of the case terminology has been applied to a number of distinct sets of problems, each with a separate analysis." *Brady v. Park*, 2019 UT 16, ¶ 44. While a case is pending in the district court, the law of the case only has application to the parties. *Id.* The district court may reconsider its rulings at any time. *Id.*

But once a case has been appealed, the district court is bound by the mandate rule. The mandate rule applies in two situations: First, it "'dictates that pronouncements of an appellate court on legal issues . . . become[] mandatory after an appeal and remand.'" *Id.* ¶ 45 (citations omitted). Second, even if they are not appealed, "'prior decision[s] of a district court become[] mandatory after an appeal and remand.'" *Id.* (citations omitted). These two iterations of the mandate rule are enforced by the appellate courts, whether the district court "disturb[s] any of its pre-appeal factual findings or legal conclusions" or disturbs a appellate court "a legal determination of the court of appeals." *Id.* ¶ 46.

There is no dispute that the district court made pre-appeal rulings on the objections to the Wayne Watson deposition. Thus, at least the second iteration of the mandate rule applies to the State's current objections. Whether the first iteration of the mandate rule applies turns on whether the Supreme Court reached the merits of the State's objections to the Watson deposition.

¹ The Utah Supreme Court refers to the district court's "holding." District court rulings do not have holdings. Instead, district courts make findings, conclusions, and rulings on evidentiary objections. The use of the word "holding" has likely contributed to the parties' confusion of the Utah Supreme Court's opinion.

In deciding this question, the Court finds the *Brady v. Park* case instructive.

The issue in *Park* was the amount owed on a promissory note for a seller-financed real estate purchase. The case had gone through two rounds of litigation in the district court and one round of litigation in the Court of Appeals before finally reaching the Supreme Court.

In the district court (before the first appeal to the Court of Appeals), the district court found that applying a 10% late fee on the promissory note was unconscionable and unenforceable. On appeal, the Court of Appeals found that the district court had applied the wrong test for unconscionability and remanded the issue back.

Furthermore, in deciding whether the buyers were required to pay default interest (not a late fee) to bring the note current, the Court of Appeals stated that “payment of the accrued default interest was not required to bring the Note current,” and so “the 20% default interest rate runs from the expiration of the five-day grace period until the payment was made, together with the 10% late fee (if the trial court determines on remand that the 10% late fee is enforceable).”

The case was remanded. Back in the district court, the district court found the 10% late fee was enforceable. The parties then argued about whether the late fee needed to be paid in order to bring the note current. The district court found that the payment of the late fee was not necessary to bring the note current.

On appeal to the Utah Supreme Court, the sellers argued that the district court violated the mandate rule by addressing whether the 10% late fee needed to be paid to bring the note current. The sellers argued that the phrase “together with the 10% late fee” from the Court of Appeals opinion shows the Court of Appeals meant for the buyers to pay the late fee along with the payment in order to bring the note current.

The Utah Supreme Court found that “[i]t is unlikely that by making this comment the

court of appeals intended to rule on this issue because the issue had not been presented and briefed by the parties." The Court included a footnote citing *Madsen v. Wash. Mut. Bank FSB*, 2008 UT 69, ¶ 26, 199 P.3d 898 (“[W]e frequently decline to rule on an issue when it has not been fully briefed by the parties because full briefing allows this court to carefully consider fully developed and supported arguments.”); *cf. Utah Dep’t of Transp. v. Ivers*, 2009 UT 56, ¶ 19, 218 P.3d 583 (explaining that the court “would have refused to review such an unripe or moot issue because [the] decision would have amounted to nothing more than an advisory opinion”); *State v. Ortiz*, 1999 UT 84, ¶ 3, 987 P.2d 39 (“This court will not issue advisory opinions or examine a controversy that has not yet ‘sharpened into an actual or imminent clash of legal rights and obligations between the parties thereto.’ ” (citation omitted)).

Therefore, because neither the pre-appeal district court nor the Court of the Appeals had addressed the issue, the Utah Supreme Court found that the district court did not violate the mandate rule when it determined the late fee was not necessary to be paid to bring the note current.

Just as it was unlikely the Court of Appeals intended to rule on issues that were not properly briefed in the *Park* case, it is unlikely that the Utah Supreme Court in *Carter* intended to decide whether the district court erred in ruling upon the State’s objections to the Wayne Watson deposition. The objections were not briefed. The district court had already ruled that there was a genuine dispute of material fact about whether Watson suppressed financial benefits paid to the Tovars and whether he intentionally failed to correct false testimony. Therefore, the State’s objections to Watson’s deposition transcript and exhibits had no impact on the Utah Supreme Court’s ultimate opinion. Any comment on the propriety of the district court’s evidentiary decisions would have been superfluous to the Supreme Court’s holding.

Accordingly, the Court concludes that the Utah Supreme Court did not reach the objections to the Wayne Watson deposition. Even so, the second iteration of the mandate rule applies because the district court did make pre-appeal rulings on each of the State's objections to the Watson deposition. This is so unless an exception to the mandate rule applies.

2. Exceptions to the Mandate Rule

The mandate rule “was developed to promote the obedience of inferior courts as well as ‘to avoid the delays and difficulties involved in repetitious contentions and reconsideration of rulings on matters previously decided in the same case.’” *Gildea v. Guardian Title Co. of Utah*, 2001 UT 75, ¶ 9 (quoting *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995)). “The doctrine, however, is not applied inflexibly.” *Id.* “Indeed, this court need not apply the doctrine to promote efficiency at the expense of the greater interest in preventing unjust results or unwise precedent.” *Id.*

Three exceptional circumstances dictate when the district court has “no discretion but rather *must* reconsider a previously decided, unappealed issue.” *McLaughlin v. Schenk*, 2013 UT 20, ¶ 24 (emphasis added). “In these situations, a judge is *required* to reassess a prior ruling. These situations are ‘(1) when there has been an intervening change of authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice.’” *Id.* (quoting *Mid-Am. Pipeline*, 2009 UT 43, ¶ 14) (internal quotations marks omitted) (emphasis added).

"[M]anifest injustice [is] synonymous with plain error and . . . the same analytical model applies to each. The plain error test has three parts: the demonstration of error; a qualitative showing that the error was plain, manifest, or obvious to the trial court; and evidence that the error affected the substantial rights of a party." *Jensen v. Sawyers*, 2001 UT 81, ¶ 61.

This Court has reviewed each of the prior judge's rulings on the Wayne Watson deposition objections to determine whether the prior judge's rulings were clearly erroneous and would work a manifest injustice.

3. Rulings on Objections in Wayne Watson Deposition

a. P. 15, line 22 through P. 17, line 20

The State objects to Carter's attorney showing Watson a declaration from a juror who commented on whether the following evidence would have changed his mind: a man named Thor Dahlquist had said that his mother had told him that Eva Oleson had told her that her husband Orla would kill her.

The district court ruled that the testimony violated rule 606. This ruling is not clearly erroneous. In fact, this Court would have also sustained the objection as hearsay and not relevant to the *Brady* or *Napue* claims. The Court will not disturb the prior ruling.

b. P. 39, lines 4-8

Watson testified that cash gifts, rent, and utilities being paid is information that should be turned over to the defense. The State objects to the following question: "Because it shows their bias on behalf of testifying for the state potentially in the eyes of the —." Watson responds, "Yeah."

The district court sustained the objection because the question was leading. This is a clearly erroneous ruling. Watson was hostile throughout the questioning. He resents that his prior work as a prosecutor would be called into question, takes queues from the State's attorney's objections, and refuses to answer some questions. In addition, he is a witness who is identified with the Respondent State of Utah. Leading questions in these circumstances are permitted under Rule 611 of the Utah Rules of Evidence.

Even so, sustaining the objection does not work a manifest injustice. The Court can deduce whether giving a witness gifts and payments shows bias without the benefit of Watson's testimony. There is no evidence this question and answer would have affected the substantial rights of a party. A *Brady* violation can occur whether the State suppresses the exculpatory evidence willfully or inadvertently. *Tillman v. State*, 2005 UT 56, ¶ 28. And *Brady* violations do not turn on the good or bad faith of the prosecutor. *Brady v. Maryland*, 373 U.S. at 87. For these reasons, the Court will not disturb the prior ruling.

c. P. 44, line 3 through P. 45, line 12

During the deposition, Carter's attorney showed Watson Perla Lacayo's declaration and then explained how Lacayo claimed to have been threatened by police with deportation and with removal of her children. She also stated she was aware that the Tovars were threatened with deportation. After being shown Lacayo's declaration, Watson's responded: "It says what it says."

The district court sustained the State's objection as being improper evidence under 404(a) and 404(b), hearsay under 802, and irrelevant to the *Brady* and *Napue* claims.

This ruling is not clearly erroneous. The prior ruling stands.

d. P. 46, lines 4-15

During the deposition, Watson testified as follows:

Q: Well, would you at least agree with me that threats of deportation could have a great impact upon a witness, just hypothetically?

A. Not me, wouldn't have a threat on me.

Q. But a witness who could be deported, would you agree that that could be a very motivating factor?

A. I can't put myself in the mind of a witness. It depends. If they have been deported

already five times, it probably doesn't bother them.

Q. As a parent, would the loss of your children be a motivating factor for a witness?

A. I don't know.

The district court sustained an objection to prior exchange because the questions were asking for speculation. This ruling is not clearly erroneous. The prior ruling stands.

e. P. 58, line 12 through P. 60, line 6

In summary, Carter's attorney showed Watson a juror declaration, which describes Epifanio Tovar as frightened or uneager to testify during his testimony. Watson responds that the juror declaration says what it says but that his own recollection was that Epifanio was anxious to testify at trial and be done with the case.

Q: So if another juror in fact said that [Epifanio] appeared very nervous, would you have any reason to disagree with that?

A. I imagine if I was an illegal alien testifying in a court of law, I would be nervous, too.

Q. Okay. And if the same juror said that he did not seem to be a very reliable witness, would you have any reason to disbelieve that?

The district court sustained the objection under rule 606. This ruling is not clearly erroneous. The prior ruling stands.

f. P. 60, lines 13-24

During the deposition, Watson commented on the efforts of Carter's investigator to get Watson and others to sign affidavits. Watson testified:

A. He also tried it with me, didn't he? He gave me an affidavit which I refused to sign for the same reason.

Q. Well, I think you also told him that you needed to check with Mr. [Bunker] before you

signed anything.

A. I don't even know who Mr. Bunker is.

Q. The AG, former AG in the case.

A. I didn't know the name, and I don't know the name now. No, I would not have told him that. I would have told him I need time to consider this.

THE WITNESS: Shame on you.

The prior judge sustained the prior exchange as being irrelevant. This Court finds that the prior court's ruling may not be clearly erroneous in the context of a motion for summary judgment. But this evidence is relevant for purposes of trial and excluding it would be clear error. At trial, Watson's credibility will be a material consideration for this Court during trial. And that credibility determination will now have to be made on Watson's deposition testimony alone because Watson died on December 19, 2019, nine months after the Utah Supreme Court remanded this case for a hearing.

This exchange provides insight into Watson's bias. It demonstrates his willingness to impute ill motives to defense investigators, and his disdain for defense counsel. Any testimony that provides such insights into Watson's biases is essential to the Court's determination of his credibility. Therefore, given the trial context and Watson's unavailability, the Court concludes that excluding this evidence would be clear error and work a manifest injustice. The objection is OVERRULED.

g. P. 62, line 9 through P. 64, line 17

Q. Okay. Do you agree that the mention of rape is a powerful fact in a criminal case?

A. I think it's a powerful fact in this case because it was an element of the death penalty.

Q. And even if no rape actually occurred, mentioning it as a possible motive would have

a great impact on the jury?

A. Why would I put in evidence that no rape occurred and lie and say that it did?

Q. Well, attempted rape. You don't agree that that's not going to have an impact on the jury in regards to the death sentence?

In response to this question, Watson described the evidence of attempted rape presented to the jury.

The prior judge sustained the objection because Carter asked leading questions and because the questions did not specifically reference the Tovars and the rape evidence. The prior judge's ruling was clearly erroneous. Watson is a hostile witness who is identified with the opposing party. Under rule 611(c), leading questions are allowed.

During the evidentiary hearing, Tovar recanted his trial testimony about Carter saying he was going to "rape, break and drive." Tovar said that he only testified to this statement because that is what the police wanted him to say. According to Tovar, what Carter actually said was that he was going to break into a car and steal some money.

To prevail on his *Napue* claim, Carter must prove that Watson intentionally or knowingly elicited from Tovar the false "rape, break, and drive" statement Tovar attributed to Carter. *See State v. Gordon*, 886 P.2d 112, 115-16 (Utah Ct. App 1994) ("When a prosecutor is aware that testimony is false, he or she has a duty to correct the false impression." (quoting *State v. Walker*, 624 P.2d at 690)); *Giglio v. United States*, 405 U.S. 150, 153 (1972) (The "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935))). Watson's belief in the power of any evidence proving Carter intended to rape the victim is relevant to and highly probative of Watson's mental state and motive in eliciting the allegedly

false testimony. This evidence is central to Carter's *Napue* claim, and excluding it would constitute a manifest injustice. For these reasons, the State's objection is OVERRULED.

h. P. 65, line 19 through P. 67, line 12

In summary, Carter's attorney questioned Watson about a declaration from Carlyle Bryson, who stated he had reservations about Richard Mack. Watson provided his opinion about Mack.

The prior judge sustained the State's objection that the testimony is irrelevant. The prior ruling is not clearly erroneous. The prior ruling stands.

i. P. 68, lines 24-25

In an aside from Watson, Watson asked "You are not going to whisper to me, send me notes, nothing? Not even shut up?"

The prior judge sustained the objection as non-responsive to a question. In the context of summary judgment, the prior judge's ruling was not clearly erroneous. But in the context of trial, Watson's aside is relevant to show his cavalier approach to the proceedings, his defensiveness, and bias. The Court finds the prior judge's ruling is clearly erroneous. And because this Court must decide Watson's credibility based on Watson's discovery deposition alone, any information in that deposition impeaching his testimony for bias is highly relevant. Thus, excluding this evidence would create a manifest injustice. For these reasons, the State's objection is OVERRULED.

j. P. 74, line 18 through P. 76 line 16

During the deposition, Carter's counsel asked Watson about Watson having previously been disciplined by the Utah State Bar. Watson asked the State to object to the question and then refused to answer any of the questions about the previous Bar discipline.

The prior ruling excluded the questioning because Carter did not establish that Watson's prior discipline with the Bar was probative of Watson's character for truthfulness under rule 608.

Carter argues that the evidence is being offered to show bias, not truthfulness. According to Carter, if at the time of the deposition Watson had already been disciplined by the Utah State Bar, then he would have had a strong incentive to deny any wrongdoing in this case that might result in further (and presumably more severe) discipline.

This argument was not presented to the prior judge, and the prior judge did not have an opportunity to rule on it. Evidence of Watson's motive to deny wrongdoing in Carter's criminal case is relevant to a determination of his credibility.

Although evidence of Watson's misconduct as a lawyer constitutes a prior bad act as defined by rule 404(b) of the Utah Rules of Evidence, Carter has sufficiently argued a noncharacter purpose, i.e., a motive to deny wrongdoing. The evidence is not offered for the purpose of showing that Watson had violated ethical rules in the past and therefore is more likely to have violated ethical rules in this case. The Court will not be swayed by this improper character inference. Therefore, the risk of unfair prejudice is remote for purposes and does not substantially outweigh probative value. URE 403.

Accordingly, the State's objection is OVERRULED.

k. P. 76, line 17 through 78, line 13

Carter's counsel asked Watson questions about his conduct during a prior DUI investigation involving Watson, including questions about whether Watson contacted the arresting officer and asked the officer not to send in a report about Watson's refusal to take a breathalyzer test. In response to this line of questioning, Watson refused to answer, denied contacting the officer, and said the charge was expunged.

The prior judge excluded the evidence because Carter did not establish that the questioning was probative of Watson's truthfulness under rule 608.

The line of inquiry related to Watson's attempts to influence the outcome of his own DUI investigation is a specific instance of conduct relating to his character for truthfulness. Watson attempted to facilitate the concealment of a police report documenting his refusal of a breath test during a DUI investigation. This concealment relates to Watson's character for truthfulness. On this point, the district court's prior ruling was clearly erroneous. Because this Court must determine Watson's credibility from his deposition alone, inquiry into specific instances of conduct aimed at discrediting his character for truthfulness is important to the Court's determination. Excluding this evidence under these circumstances would work a manifest injustice.

For these reasons, the State's objection is **OVERRULED**.

I. P. 78, line 14 through P. 80, line 5

After completing the line of inquiry related to Watson's DUI, Carter's counsel asked Watson about whether he recalled the circumstances of the translation in this case. Watson replied: "I'm not going to answer any more questions. They are all bunk, and especially when you pull this crap out of the file." The attorneys and the witness then have a conversation about whether to end the deposition, including the following statement from Watson: "I have agreed to continue on in the deposition, so don't put anything on the record that I walked off."

Although the State objected to this line of questioning, the prior judge did not explicitly rule on its admissibility. Therefore, there is no prior adjudication of this objection, and the mandate rule does not apply.

The State's objection is **OVERRULED**. This evidence is relevant to Watson's bias and

credibility. Specifically, it shows his strong resentment of the proceedings and disdain for defense counsel's inquiries and the proceedings. The State has not articulated a persuasive reasons for why this testimony should be excluded. It is highly probative of Watson's motives and credibility. And that probative value is not substantially outweighed by any articulated unfair prejudice.

m. Exhibits 16 through 19

Carter's counsel also offered Exhibit 16 (a Stipulation and Order suspending Watson from the Utah State Bar); Exhibit 17(a complaint about a breach of contract case in Weber County where Watson was accused of comingling funds and not issuing a refund); Exhibit 18 (a Utah County online police report); and Exhibit 19 (a Court of Appeals decision affirming a judgment against Watson in a civil case). Watson was not asked about the Court of Appeals decision in the deposition. The prior judge excluded the documents as inadmissible extrinsic evidence of a character for dishonesty under rule 608.

The prior judge's ruling is not clearly erroneous with regard to the objections that were made during the summary judgment determination. The State's objections to Exhibit 17, 18, and 19 are sustained. The prior ruling stands.

With respect to Exhibit 16, Carter has now argued that the fact of Watson's prior Bar suspension is admissible to show Watson's motive to deny any wrongdoing in Carter's criminal case in order to prevent additional Bar sanctions. The prior judge did not rule on the admissibility of the Exhibit 16 for this purpose. The State's objection to Exhibit 16 is **OVERRULED**. Evidence of Watson's motive to deny wrongdoing is probative of his credibility, an issue central to this case. And because Watson died, his credibility must now be determined solely on the evidence presented in his trial deposition. For these reasons, the Court admits

Exhibit 16 solely for the purpose of establishing the fact of Watson’s prior Bar suspension. The fact of the prior suspension—not the underlying reasons for it—is all that is necessary to establish Watson’s motive to deny wrongdoing in this case. Exhibit 16 will not be considered for any other purpose, including any character purpose as prohibited by rule 404(a).

ORDER

For the forgoing reasons, the State’s Partial Objections to the Wayne Watson Deposition are SUSTAINED in part and OVERRULED in part.

This is the order of the court for the matters addressed herein.

DATED this 17th day of November, 2021.

/s/ Derek P. Pullan



JUDGE DEREK P. PULLAN
Fourth District Court

Addendum E

2019 UT 12

IN THE
SUPREME COURT OF THE STATE OF UTAH

DOUGLAS STEWART CARTER,
Appellant,

v.

STATE OF UTAH,
Appellee.

No. 20170641
Filed March 21, 2019

On Direct Appeal

Fourth District, Utah County
The Honorable Lynn W. Davis
No. 150400825

Attorneys:

Loren E. Weiss, Salt Lake City; Jon M. Sands, Paula K. Harms,
Eric Zuckerman, Phoenix, for appellant

Andrew F. Peterson, Erin Riley, Daniel W. Boyer, Asst. Solics. Gen.,
Salt Lake City, for appellee

JUSTICE HIMONAS authored the opinion of the Court in which
JUSTICE PEARCE, JUSTICE PETERSEN, JUDGE MORTENSEN, and
JUDGE POHLMAN joined.

Having recused themselves, CHIEF JUSTICE DURRANT and
ASSOCIATE CHIEF JUSTICE LEE did not participate herein.

COURT OF APPEALS JUDGE DAVID N. MORTENSEN
and COURT OF APPEALS JUDGE JILL M. POHLMAN sat.

JUSTICE HIMONAS, opinion of the Court:

INTRODUCTION

¶1 For over three decades Douglas Carter has been on death row for the brutal murder of Eva Olesen. A jury convicted Carter in 1985 of murdering Ms. Olesen based in no small measure on the testimony of Epifanio and Lucia Tovar. Shortly after the Tovars

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testified against Carter at the guilt phase of his trial, they vanished. A separate jury sentenced Carter to death based, again, in no small measure on the Tovars' prior trial testimony, which had to be read to the jury in light of the Tovars' absence.

¶2 Through a coincidence, Carter's current counsel located the Tovars in 2011. After interviewing them, counsel obtained their sworn declarations. In these declarations the Tovars assert under "penalty of perjury" that (1) they were threatened by police with deportation, the removal of their son, and prison if they did not cooperate in the case against Carter, (2) they felt pressured to make untrue statements, and (3) they were explicitly instructed to lie under oath about substantial financial benefits provided to them by the police and previously undisclosed to defense counsel.

¶3 With these damning revelations in hand, Carter's counsel filed a petition for post-conviction relief, which the State responded to with a motion for summary judgment. Despite finding the existence of genuine disputes of material fact regarding whether the police or prosecution "threatened . . . the Tovars," "coached the Tovars' testimony," and suborned perjury by telling Mr. Tovar "to lie about benefits he received from the State," the district court summarily dismissed Carter's petition on the grounds that, as a matter of undisputed fact and law, Carter was not prejudiced by this conduct at either the guilt or sentencing phases of his trial.

¶4 Because the district court erred in this determination, we reverse and remand for an evidentiary hearing consistent with this opinion.

BACKGROUND¹

Murder of Eva Olesen

¶5 On February 27, 1985, Orla Olesen found his wife, Eva, murdered in their Provo, Utah home. Ms. Olesen’s hands were tied behind her back, her clothes had been removed from the waist down, and her sanitary pad had been removed and was lying at her feet. She had been stabbed eight times in the back, once in the abdomen, and once in the neck. She had also suffered a fatal gunshot wound to the back of her head.

¶6 A specialist from the Bureau of Alcohol, Tobacco, and Firearms determined that the markings on the slug removed from her body were consistent with those produced by a .38 special handgun. The gun used to kill Ms. Olesen was never located. The knife used to inflict the stab wounds was recovered at the scene and determined to have come from the Olesens’ kitchen. Detectives also recovered nineteen fingerprints and a blonde pubic hair from the scene. None of the physical evidence linked Carter to the scene of the crime.

¹ When reviewing a grant of summary judgment we recite all facts in favor of the nonmoving party—in this case, Carter. *See, e.g., Poteet v. White*, 2006 UT 63, ¶ 7, 147 P.3d 439. We also draw all reasonable inferences in favor of the nonmoving party. *Id.*

We also wish to bring to the reader’s attention a stylistic choice regarding how statements and testimony are recounted in this section. When describing statements and testimony in this section, we have opted to forego prefacing every statement or piece of testimony with something akin to “according to this witness” or “this witness said.” Instead, we provide such a preface at the beginning of that witness’s testimony and often proceed to describe the remainder of the testimony without any such preface.

By way of example, in recounting Anne Carter’s statement to police in paragraph 11, we state:

In her statement to police, Ms. Carter reported that Carter had gone to visit his friend, Epifanio Tovar, on the night of the murder. While at Mr. Tovar’s house, Carter also met two of Mr. Tovar’s friends. One of these friends held a grudge against Provo Police Chief Swen Nielsen, who was Ms. Olesen’s nephew.

The second and third sentences are not to be read as a declaratory statement of fact made by this court. Instead, those sentences simply reflect what Ms. Carter said in her police interview.

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Initial Investigation of Carter

¶7 On March 14, 1985, Provo Police brought Carter in for questioning on the basis of two independent tips. First, an eyewitness had identified Carter as a possible suspect in a separate case—a vehicle trespass that had occurred an hour or two prior to the murder in the same general area. Second, police had received information that Anne Carter—Carter’s wife at the time, but who was contemporaneously seeking a divorce from Carter—had told someone that she rushed home after learning of the murder to see if Carter had been involved. During questioning, Carter admitted that he knew Ms. Olesen—who had purchased health care products from Anne in the past—but denied involvement in the murder. Carter was fingerprinted and released.

¶8 On March 20, 1985, police brought Carter in for a second round of questioning regarding the murder. Police told Carter that they had brought him in for further questioning because of some discrepancies between his and Anne’s statements. Carter maintained his truthfulness and gave police permission to take hair samples to compare with those found at the scene. At the time of this second interview, Carter was one of about eight suspects in the murder.

Anne Carter’s Statement to Police

¶9 On April 8, 1985, Ms. Carter approached Deputy Utah County Attorney Sterling Sainsbury, who she knew through her position as a clerk for the juvenile court, and told him that she thought Carter had been involved in the murder. Ms. Carter suspected that her missing handgun, a .38 special, was the murder weapon and she was afraid that she would be implicated as an accessory to the crime. Mr. Sainsbury informed her that he was obligated to report her story to the Utah County Attorney’s Office and he recommended that she obtain legal counsel and come forth with the information voluntarily. Mr. Sainsbury then sought out the prosecutor assigned to the murder, Utah County Deputy Attorney Wayne Watson, and relayed Ms. Carter’s statements to him.

¶10 Ms. Carter sought advice from Robert Orehoski, who was representing her in her divorce action against Carter. Mr. Orehoski, who coincidentally happened to be Mr. Watson’s private law partner, recommended that she seek a conditional grant of immunity in exchange for her information. Ms. Carter decided to give a statement to police and agreed to a search of her home, during

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which police recovered several articles of bloodstained clothing² and .38 caliber ammunition.

¶11 In her statement to police, Ms. Carter reported that Carter had gone to visit his friend, Epifanio Tovar, on the night of the murder. While at Mr. Tovar's house, Carter also met two of Mr. Tovar's friends. One of these friends held a grudge against Provo Police Chief Swen Nielsen, who was Ms. Olesen's nephew. Carter and the two friends decided to go to the Olesens' house and steal Ms. Olesen's gold necklace. Carter waited in the car while the other two men knocked on the door and entered the house. Carter was unaware of what happened in the house until the two men returned to the car and told him that Ms. Olesen was dead.

Perla Bermudez Interview

¶12 Based on the information provided by Ms. Carter, police next interviewed Perla LaCayo Bermudez on April 10, 1985.³

² Because we believe it important to our prejudice analysis, we reiterate that no physical evidence linked Carter to the crime scene. For example, the record reflects that the blood on the clothing recovered during the search of the home was not Ms. Olesen's.

³ There are some significant concerns with this interview that must be noted. First, the transcript begins with the interviewer, Officer Richard Mack, telling Ms. Bermudez, "I know that you already told me all of [this], but we need to repeat[] it for the recorder. Okay?" This makes clear that the information contained in the transcript is not from the initial interview with Ms. Bermudez, but instead recounts what took place in that initial interview.

Second, it appears that the interview takes place over several days, but it is unclear from the transcript where one interview ends and another begins. While the transcripts of the interview are marked as being recorded on April 10, 1985, it seems obvious from the record that the interview did not occur entirely on April 10, 1985. At several points, the record demonstrates that Ms. Bermudez was brought in for multiple interviews. A supplementary report states that Officer Mack was "requested to *reinterview* [Ms. Bermudez] to see if any more information could be determined as to the whereabouts of [Carter]." This is corroborated by another supplementary report from Officer Mack on April 12, 1985, that begins: "Today I *again* made contact with [Ms. Bermudez]." It is also worth noting that the discussion between tapes is not continuous

(continued . . .)

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Ms. Bermudez was friends with Carter and Mr. Tovar and had seen both of them in the days prior to her interview. Ms. Bermudez told police that Carter had been acting strange in the month prior and that he had told her that he was a suspect in Ms. Olesen's murder. Carter said he planned to leave for Chicago and gave Ms. Bermudez a portable whirlpool used to heat up water as a parting gift. When she tried to use the whirlpool, it began smoking; she opened the whirlpool to reveal a gun wrapped in some kind of rag or t-shirt. Carter later returned to retrieve the whirlpool. A few days later, Ms. Bermudez and Mr. Tovar drove Carter just across state lines to Wendover, Nevada to catch a bus to Chicago.

¶13 When asked whether Mr. Tovar knew that Carter was a suspect in the murder, Ms. Bermudez initially responded that she did not think Mr. Tovar knew anything. However, Ms. Bermudez later changed course and offered that Mr. Tovar told her that Carter had confessed to him about the murder.⁴ Mr. Tovar told her that Carter had gone to Ms. Olesen's house and forced his way inside. Ms. Olesen grabbed a knife from the kitchen, but then dropped it when Carter told her to let go of it. Carter instructed Ms. Olesen to lie down on the floor, where he pulled her pants down. Carter then stabbed Ms. Olesen in the back and shot her through a pillow.

and features significant gaps in the conversation, which make it difficult to demarcate where the different interviews begin and end.

The transcript also suggests that Ms. Bermudez spoke to Mr. Tovar between interviews and told him that the police may ask more questions of both her and Mr. Tovar. She told Mr. Tovar that "if they ask—ask me again—I even told him, Epifanio, I said, if they come here, I said, say the truth instead." Because of these inconsistencies, it is difficult to establish a clear timeline with respect to the interactions between the police and Ms. Bermudez and between Ms. Bermudez and Mr. Tovar.

⁴ This portion of the transcript probably comes from one of the interviews that were taken after the initial interview with Officer Mack, as this statement indicates a clear reversal from her prior statement that Mr. Tovar did not know anything. A supplementary report dated April 12, 1985, suggests this is the case, as Officer Mack noted "I told [Ms. Bermudez] that she had to know more about [Mr.] Tovar's involvement in this entire situation. She admitted that she did."

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¶14 Mr. Tovar told Ms. Bermudez that he was afraid of Carter and what Carter might do to his family. Mr. Tovar also told her that he was not sure if he believed Carter because Carter lied a lot.

Epifanio Tovar's Police Interview

¶15 As a result of the interview with Ms. Bermudez, police felt they had probable cause to take Mr. Tovar into custody for obstruction of justice. Mr. Tovar was taken into custody on April 12, 1985.⁵ That same day, Provo Police Lieutenant George Pierpont conducted an interview with Mr. Tovar, who eventually provided a similar version of the story that Ms. Bermudez had told.⁶

¶16 Mr. Tovar initially denied any knowledge of the murder. When Mr. Tovar denied knowledge, Lieutenant Pierpont asked, "Are we going to tell each other the truth today?" Lieutenant Pierpont later added, "I want the truth. And if you do not tell me the truth—don't get yourself buried my friend." Mr. Tovar continued to deny knowledge of the murder and told Lieutenant Pierpont that he was afraid something might happen to him. Lieutenant Pierpont responded that if Mr. Tovar talked to him, he would be able to tell Mr. Tovar whether anything was going to "come down on" Mr. Tovar, but told Mr. Tovar, "I know what's already happened, I need to hear that from you," and "you've got to tell me what's happened in this thing, and you know." Mr. Tovar replied, "Okay, okay. [Carter] told me that he homicide a lady."

¶17 According to Mr. Tovar, Carter was at Mr. Tovar's house on the night of the murder and left around 7:30 pm to "go and try to steal some money." Carter returned to Mr. Tovar's house a couple hours later and appeared visibly shaken. Carter told Mr. Tovar that he had killed Ms. Olesen. Carter had gone to the Olesens' house and

⁵ According to his testimony at trial, Mr. Tovar was held in custody for four days. The timeline is not entirely clear from the record, but it appears that Mr. Tovar was first interviewed and then held in jail for four days.

⁶ It appears from the transcript that this was not the first time Lieutenant Pierpont and Mr. Tovar had talked to each other. At the beginning of the interview, Lieutenant Pierpont tells Mr. Tovar, "The reason you're here is because of a friend of yours. . . . I'm sure you saw me the other day up there, and I saw you *and we talked for a minute.*" It is unclear exactly what encounter Lieutenant Pierpont is referring to, but it is clear that there was a previous encounter—however brief it may have been.

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knocked on the door. When Ms. Olesen answered the door, Carter felt that the look she gave him showed that she viewed him with prejudice because he was Black. Carter became angry, pointed a gun at Ms. Olesen, and told her to get inside the house. Ms. Olesen grabbed a kitchen knife, but she dropped the knife at Carter's direction and laid down on the floor. Carter then proceeded to repeatedly stab Ms. Olesen in the back with the knife. Ms. Olesen was still alive after Carter stabbed her repeatedly, so he grabbed a pillow to muffle the sound and shot Ms. Olesen in the back of the head. Carter took nothing from the home and took care to leave behind no fingerprints.

¶18 The following day, Mr. Tovar watched the news and read the paper, which confirmed Ms. Olesen's murder. In doing so, Mr. Tovar read that Ms. Olesen had been raped. When Mr. Tovar saw Carter again, Mr. Tovar asked him if he had raped Ms. Olesen. According to Mr. Tovar, Carter replied that he did not rape Ms. Olesen and that he pulled her pants down but she was "on the rag." Carter also told Mr. Tovar that he might dispose of the gun by throwing it in a lake, but Mr. Tovar denied knowledge of the actual whereabouts of the gun.

¶19 Mr. Tovar also disclosed that he had helped drive Carter to Wendover to catch a bus out of the state, although he was uncertain exactly where Carter was headed.

Carter's Arrest and Confession

¶20 A warrant was issued for Carter's arrest and the State filed an information charging Carter with capital murder. Carter was eventually located on June 11, 1985, in Nashville, Tennessee, where he was arrested and taken into custody. Carter was interrogated that day by Officer William Cunningham of the Nashville Police Department. Carter was questioned for about four hours on June 11 and four more hours on June 12. During the interview, Carter was "inquisitive" and "asked numerous times" what had happened to JoAnn Robins, a woman he had befriended and whose home he was in at the time of his arrest. Officer Cunningham informed Carter that she had been arrested and charged as an accessory after the fact for harboring a fugitive. Over the course of the two-day interrogation, Carter repeatedly insisted that Ms. Robins knew nothing about the murder of Ms. Olesen. Carter made no incriminating statements to Officer Cunningham.

¶21 The following day, Lieutenant Pierpont arrived in Nashville and took over the interrogation. Within about thirty minutes, Lieutenant Pierpont was able to extract a confession in

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which Carter admitted to entering the Olesens' home, stabbing Ms. Olesen, and shooting her in the back of the head. The confession also states that Carter went around the house looking for things to steal. Notably, Carter's confession does not mention anything about removing Ms. Olesen's clothes.

¶22 Carter's counsel filed a motion to suppress the confession, contending that his confession was coerced. Carter claimed to have seen Ms. Robins in the jail while he was being held there. Carter also claimed that Officer Cunningham promised to help Ms. Robins if Carter would help him. According to Carter, Officer Cunningham repeated this promise every time that Carter asked about Ms. Robins. Counsel also raised concerns regarding the procedure by which his confession was obtained. The confession was dictated by Lieutenant Pierpont to a tape recorder⁷ and a secretary later typed up what Lieutenant Pierpont had dictated.⁸ Lieutenant Pierpont would pause intermittently to ask Carter whether what he was saying was accurate. After the statement was typed up, Carter reviewed the statement and signed it.⁹ The trial court rejected the motion to suppress and this court later affirmed, noting that Carter's "own detailed statements to [*the Tovars*] immediately after the crime parallel and substantially support the confession given to the police." *State v. Carter*, 776 P.2d 886, 890 (Utah 1989) (emphasis added).

Preliminary Hearing Testimony

¶23 On June 25, 1985, the court held a preliminary hearing at which Mr. Tovar and his spouse, Lucia Tovar, among others, testified.

⁷ The tape was never brought to Utah from Tennessee and was apparently destroyed at some point between the dictation of the confession and Carter's trial.

⁸ The typist listed on the confession, Julie Hoffman, has stated that this confession does not appear to her to have been taken and dictated in the usual manner of that time period. Ms. Hoffman declares that she would usually type a suspect's words as the suspect was interviewed, and that the interview would be recorded on a tape, which was kept as evidence.

⁹ Carter testified that while his signature appears on the confession presented at the preliminary hearing, it was a different document than the one he signed in Nashville.

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¶24 Mr. Tovar gave testimony similar to the statement he gave to police on April 12, 1985. Mr. Tovar recounted Carter telling Mr. Tovar that he was going to go out and break into a car or steal some money, but when he returned he admitted to killing Ms. Olesen. Mr. Tovar also recalled Carter telling Mr. Tovar in a subsequent conversation that he did not rape Ms. Olesen. Mr. Tovar did offer some information that was absent from his April 12 statement. Specifically, Mr. Tovar testified that Carter demonstrated the act of the murder by lying on the ground and showing Mr. Tovar how he stabbed Ms. Olesen.

¶25 Ms. Tovar also testified at the preliminary hearing. Speaking through a translator, Ms. Tovar testified that she observed the conversation between Carter and her husband on the night of February 27. She stated that she understood very little of the conversation that took place, but she observed Carter's physical demonstration. Carter demonstrated lying down with his hands behind his back and then signaled that he was shooting someone.

1985 Trial Testimony

¶26 At trial, the State again called Mr. and Ms. Tovar to testify. Mr. Tovar provided testimony similar to the testimony he gave during his initial police interview and at the preliminary hearing with two noteworthy exceptions. First, Mr. Tovar testified that Carter told Mr. Tovar that he intended to "*rape, break, and drive*" when he left the Tovars' home around 7:30 pm on February 27. Second, Mr. Tovar testified that he had disposed of Ms. Carter's gun in a nearby river at Carter's request. Mr. Tovar apparently disclosed this information to police one week before the trial and acknowledged on cross-examination that he had lied in his earlier statements when he denied knowledge of the gun's whereabouts. On cross-examination, Mr. Tovar also testified that he and his family had not received any support from the prosecutor's office or the Provo Police between February and trial besides the fourteen-dollar witness fees he and his wife received.

¶27 Ms. Tovar, again speaking through an interpreter, presented a more detailed version of the events she testified to at the preliminary hearing. She testified that Carter showed her and her husband exactly how he had forced Ms. Olesen to lie down, that he put his hands behind his back to illustrate how he had tied Ms. Olesen's hands, and that he demonstrated what can be best described as a stabbing motion. She also testified that Carter "laughed and laughed" about something he had done. She said that Carter was "*laughing and giggling*" while on the ground

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demonstrating what he had done. On cross-examination, Ms. Tovar downplayed the possibility that Carter had been laughing at a television show playing in the Tovars' living room because what he was demonstrating and what he was laughing about seemed to have no relation to the television.

¶28 The jury found Carter guilty of first-degree murder and sentenced him to death the following day. Carter appealed his conviction and sentence. We vacated his death sentence and remanded for a new penalty proceeding because of an instructional error at the original sentencing. *State v. Carter*, 776 P.2d 886, 896 (Utah 1989).

1992 Resentencing Testimony

¶29 Before Carter's resentencing, the Tovars disappeared. The State maintained that the Tovars were unavailable to testify at resentencing because they had fled the country. Accordingly, the State proposed to introduce an abstract that contained all testimony by either party at the original guilt and sentencing phases—including the Tovars' testimony. The resentencing court denied Carter's motion to exclude the abstract and portions of the Tovars' testimony were read to the jury at resentencing. Among the portions read to the jury was Mr. Tovar's testimony stating that Carter intended to "*rape, break, and drive*" and Ms. Tovar's testimony that Carter "*laugh[ed] and giggl[ed]*" while demonstrating how he had killed Ms. Olesen. The State repeated these statements in its closing argument to demonstrate why it felt the death penalty was appropriate in this case. The jury sentenced Carter to death.

The Tovars Resurface

¶30 In 2011, Carter's counsel caught word that the Tovars' son had been arrested in Arizona; he agreed to speak with Carter's counsel. Through these conversations, Carter's counsel was able to locate the Tovars. The Tovars executed declarations describing their treatment by Provo Police in the months leading up to Carter's trial.

¶31 Mr. Tovar declared that he felt pressured "before, during and after" his interrogation and that he was told things "would go badly" for him if he did not cooperate. He claims that he feared for the welfare and safety of his family due to police threats that included deportation and removing the Tovars' infant son from their custody. He also declared that the police twice moved his family to a different apartment and paid the Tovars' rent, which was somewhere in the neighborhood of \$400 per month. The police also paid Mr. Tovar's phone and utility bills and would deliver groceries to the Tovars. Once trial concluded, these payments stopped.

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Mr. Tovar states that the police told him and his wife not to say anything at trial about the payments for rent and other living expenses if asked about benefits received from the police.

¶32 Ms. Tovar declared that she was not focused on the conversation that took place between Carter and her husband on the night of the murder and that her testimony at trial was sourced from what her husband had told her after the interaction. She also echoed Mr. Tovar's claims that the police moved them to new apartments and paid the Tovars' rent and utility bills, and that police instructed them not to acknowledge this arrangement if asked at trial. Additionally, the police would send the Tovars gifts such as food baskets or toys for their son, and on Christmas Day the police came caroling at the Tovars' apartment and delivered a Christmas tree. Furthermore, both of the Tovars assert that the prosecutor spoke with them before trial and told them what he wanted them to say in their testimony, and the Tovars felt they had no choice but to comply in light of the threats of deportation and separation.

¶33 The Tovars' claims of financial support are at least partially corroborated in two declarations from former members of the Provo Police Department who worked on the Olesen case. Officer Richard Mack declared that it was his responsibility to keep the Tovars happy and that he recalls bringing them groceries, Christmas gifts, and toys for their son. While Officer Mack does not recall giving the Tovars money for rent, he could not definitively say that he did not give them money for rent at some point. Officer Mack also noted that the police did make cash payments to witnesses in certain cases such as narcotics cases. Officer Stan Eggen also declared that, although he was not privy to the specifics of what was done for the Tovars, he does remember that the department assisted the Tovars once they were identified as witnesses.

Wayne Watson Deposition

¶34 Wayne Watson, the prosecutor in the original trial, was deposed in this case. When asked if it was possible that benefits were given to witnesses but not recorded in the State's file, Mr. Watson volunteered that he believed Provo City gave the Tovars "rent for a month or two." Mr. Watson claims that he learned this information from Lieutenant Pierpont but could not remember if he learned this information before or after trial. However, Mr. Watson subsequently stated that Carter's trial counsel was informed about the benefits allegedly supplied to the Tovars. When pressed on why he did not correct the Tovars' testimony that they received only the fourteen-dollar witness fee, Mr. Watson answered that he must not have

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known the exact amount of the benefits the Tovars received and that he would have assumed Carter's counsel was going to bring up the other benefits later on.

District Court Proceedings

¶35 Carter's federal court habeas proceedings were stayed so he could return to the Utah state courts to exhaust his claims regarding the Tovars. *See Carter v. Crowther*, No. 2:02-CV-326 TS, 2016 WL 843273, at *3 (D. Utah Mar. 1, 2016). Carter raises three grounds in his petition for post-conviction relief. First, Carter argues that prosecutors suppressed or failed to disclose material impeachment information regarding the treatment of the Tovars in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Second, Carter argues that Mr. Watson failed to correct the false testimony of Mr. Tovar in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). And third, Carter argues that the prosecution improperly vouched for the Tovars at trial. The State moved for and the district court granted summary judgment on all three claims.

¶36 With respect to the first claim, the district court held that prosecutors failed to disclose material impeachment information but that the failure to disclose was not material for purposes of *Brady* and Utah's Post-Conviction Remedies Act (PCRA). With respect to the second claim, the district court held that any alleged prosecutorial misconduct was not material for purposes of the PCRA. Finally, with respect to the third claim, the district court held that it was procedurally barred because the basis for a claim of improper vouching was known at the time of trial and existed completely independent of defense counsel's knowledge of the treatment of the Tovars. Carter appeals the district court's grant of summary judgment.

¶37 Carter also appeals a number of evidentiary rulings made by the district court in connection with its consideration of his petition for post-conviction relief.

¶38 We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(i).

STANDARD OF REVIEW

¶39 "Summary judgment is only appropriate if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Arnold v. Grigsby*, 2018 UT 14, ¶ 8, 417 P.3d 606 (citation omitted) (internal quotation marks omitted). "We review the district court's grant or denial of summary judgment for correctness, drawing all

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reasonable inferences from the facts in the light most favorable to the nonmoving party.” *Truck Ins. Exch. v. Rutherford*, 2017 UT 25, ¶ 5, 395 P.3d 143.

¶40 “With regard to the admission of evidence, most decisions involve a threshold statement of the legal principle governing admission or exclusion, findings of facts pertinent to a determination, and the application of the legal principle to the facts at hand with regard to admissibility.” *Arnold*, 2018 UT 14, ¶ 9. “We review the legal questions to make the determination of admissibility for correctness. We review the questions of fact for clear error. Finally, we review the [trial] court’s ruling on admissibility for abuse of discretion.” *Id.* (alteration in original) (citation omitted) (internal quotation marks omitted).

ANALYSIS

¶41 Carter presents a number of arguments on appeal. First, Carter argues that the district court erred in granting summary judgment in favor of the State with regard to his *Brady* and *Napue* claims. Second, Carter argues that the district court improperly dismissed his improper vouching claim as procedurally barred. And finally, Carter disputes a number of evidentiary rulings made by the district court.

¶42 We agree with Carter that the district court erred in granting summary judgment in favor of the State with regard to his *Brady* and *Napue* claims. Instead we hold that Carter has demonstrated that a genuine dispute of material fact exists as to whether he was prejudiced by both the *Brady* and *Napue* material. We therefore reverse and remand for an evidentiary hearing on these claims.

¶43 We disagree with Carter with regard to his improper vouching claim and hold that the district court correctly determined that it was procedurally barred. We also affirm the district court’s numerous evidentiary rulings.

¶44 We begin our discussion of Carter’s claims with an overview of the operative provisions of the PCRA. We then turn to his *Brady* and *Napue* claims, addressing each one in turn. Next, we address his improper vouching claim. And finally, we address the evidentiary rulings made by the district court and disputed by Carter on appeal.

I. PCRA OVERVIEW

¶45 The PCRA establishes the sole statutory “remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies” UTAH CODE § 78B-9-102(1)(a). A person challenging a conviction or sentence under the PCRA may file a post-conviction petition requesting that the court modify or vacate the conviction or sentence on the ground that “the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution.” *Id.* § 78B-9-104(1)(a). The court may grant relief from a conviction or sentence only if “the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding.” *Id.* § 78B-9-104(2). In other words, a court may grant post-conviction relief if a petitioner demonstrates that his or her conviction or sentence was obtained in violation of the United States Constitution or Utah Constitution and there is a reasonable likelihood that he or she would have obtained a more favorable outcome had that constitutional violation not occurred.

¶46 Carter alleges that his conviction was obtained and his sentence was imposed in the face of two constitutional violations. First, Carter asserts that the prosecution failed to disclose material impeachment information regarding the treatment of the Tovars in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Second, Carter asserts that the prosecution failed to correct the false testimony of Mr. Tovar with respect to financial benefits received by the Tovars in violation of *Napue v. Illinois*, 360 U.S. 264 (1959).

¶47 The district court held that Carter’s *Brady* and *Napue* claims did not qualify for relief under the PCRA because neither claim established a reasonable likelihood that Carter would have obtained a more favorable outcome had the violations not occurred. We disagree with the district court and hold that a genuine dispute of material fact exists as to whether Carter’s *Brady* and *Napue* claims establish a reasonable likelihood that Carter would have obtained a more favorable outcome had the violations not occurred. We now address these claims in turn.

II. CARTER’S BRADY CLAIMS

¶48 The United States Supreme Court has held that “the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The duty to

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disclose favorable evidence extends to both exculpatory and impeachment evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985), and exists regardless of whether the accused has requested the evidence, *United States v. Agurs*, 427 U.S. 97, 107 (1976). Furthermore, the prosecutor “has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

¶49 The Court has identified three necessary components to establish a *Brady* violation: (1) “[t]he evidence at issue must be favorable to the accused;” (2) “that evidence must have been suppressed by the State, either willfully or inadvertently;” and (3) “prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

¶50 To demonstrate prejudice under *Brady*, the accused must show that the suppressed, favorable evidence is material. *Tillman v. State*, 2005 UT 56, ¶ 29, 128 P.3d 1123. Such evidence is material only if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Bagley*, 473 U.S. at 682. In deciding whether evidence is material for purposes of *Brady*, there are three principles that deserve “special emphasis.” *Tillman*, 2005 UT 56, ¶ 30.

¶51 First, “a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” *Kyles*, 514 U.S. at 434. Instead, to determine whether a “reasonable probability” of a different result exists, the relevant inquiry is whether the accused “received a fair trial, understood as a trial resulting in a verdict worthy of confidence” in the absence of disclosure of the evidence. *Id.* In other words, “[a] ‘reasonable probability’ of a different result is . . . shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’” *Id.* (quoting *Bagley*, 473 U.S. at 678).

¶52 Second, “materiality . . . is not a sufficiency of evidence test.” *Id.* The accused does not have to discount the inculpatory evidence presented at trial by the value of the undisclosed evidence and then demonstrate that there would not have been enough evidence left to convict. *Id.* at 434–35. Rather, the accused only needs to show that “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at 435.

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¶53 And third, “materiality . . . must be evaluated in the context of the entire record.” *Tillman*, 2005 UT 56, ¶ 32. While courts may “evaluate the tendency and force of the undisclosed evidence item by item,” it is the collective weight of the evidence that is considered when evaluating materiality. *Kyles*, 514 U.S. at 436 & n.10.

¶54 Carter presents three pieces of suppressed evidence that he claims amount to a *Brady* violation: (1) evidence of financial benefits provided to the Tovars; (2) evidence that the prosecutor “coached” the Tovars’ testimony; and (3) evidence that the police threatened the Tovars and ordered them to lie about the financial benefits they received. The district court found that there was a genuine issue of material fact with respect to whether these three pieces of evidence are favorable. The district court also found that there was a genuine dispute of material fact with respect to whether the police or prosecution had suppressed this evidence. After finding those disputed issues of fact, the district court concluded that the evidence was not material for purposes of *Brady*. Carter and the State do not argue in their briefs that the district court’s findings with respect to favorability and suppression were in error. Instead, Carter’s and the State’s briefs focus on the question of whether the evidence was prejudicial—*i.e.* material—for purposes of *Brady*.

¶55 We conclude that a genuine dispute of material fact exists as to whether the evidence was prejudicial under *Brady*. And because the materiality standard under *Brady* is the same materiality standard contained in the PCRA, we conclude that a genuine dispute of material fact exists as to whether Carter has demonstrated prejudice remediable by the PCRA by way of a *Brady* violation.

A. Financial Benefits

¶56 Carter’s first piece of evidence is that the Provo Police Department provided the Tovars with various financial benefits. As noted above, *see supra* ¶¶ 31–32, the Tovars now declare that police moved the family to different apartments and paid the family’s rent while the Tovars waited to testify at trial. The Tovars also declare that police provided other, smaller financial benefits such as paying utility bills and buying groceries.

¶57 Carter argues that the financial benefits provided to the Tovars demonstrate that the Tovars’ testimony was “bought and paid for by police.” He claims that this evidence undermines the Tovars’ testimony as a whole and that, because of the importance of the Tovars’ testimony to the State’s case, the evidence undermines the confidence in Carter’s verdict and sentence.